NO. 35399-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEITH UTTER,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal started as a case seeking review of a determination by the State of Washington, Department of Social and Health Services (Department), that Respondent Keith Utter had a responsibility to contribute to the cost of his hospitalization at Western State Hospital (WSH). Mr. Utter was committed to WSH under RCW 10.77.090, which provides for commitment, evaluation and mental health treatment when a person is found incompetent to stand trial on criminal charges. The Department's determination was upheld on administrative review.

The superior court, reviewing the matter under the Administrative Procedures Act, RCW 34.05, reversed the Department's determination of financial responsibility. In the course of that review, the superior court also enjoined the Department from seeking reimbursement from Mr. Utter for a portion of the cost of his hospitalization. The superior court also concluded that the Department's rules in WAC 388-855 were invalid as applied to assess the financial resources of patients committed under RCW 10.77.090, and determine their ability to contribute to the cost of their hospitalization.

This appeal therefore addresses the superior court's ruling that persons committed to a state hospital pursuant to RCW 10.77.090 for evaluation and treatment of a mental illness have no obligation to

contribute to the cost of their hospitalization. However, because of the superior court's ruling, this appeal implicates more than merely the Department's authority to seek reimbursement from patients committed under RCW 10.77.090. This appeal implicates the Department's authority to pursue reimbursement from patients' available third-party benefits, such as private insurance, Medicare and Medicaid. *See* WAC 388-855-0065(1)-(2). If applied to other cases under RCW 10.77.090, the superior court's ruling may prevent the Department from seeking reimbursement from responsible third-party entities for the mental health treatment provided at taxpayer expense.[1]

II. ASSIGNMENTS OF ERROR

1. The superior court erred by entering Conclusions of Law 3.1, 3.2, 3.3, 3.4, 3.5 and 3.6 and paragraphs 4.1 and 4.2 of its Decision & Order in the *Order on Respondent's Motions to Supplement the Record and for Reconsideration, & Amended Findings of Fact, Conclusions of Law, and Decision & Final Order on Judicial Review of Administrative Decision* dated September 7, 2006.[2]

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[1] With respect to Medicare alone, undersigned counsel are informed by DSHS that this decision may jeopardize the receipt of an estimated $1.2 million in annual reimbursement for costs incurred in providing mental health treatment to persons committed under RCW 10.77.090. *See Decl. of Susan Lucas in Support of Motion to Stay Pending Appeal.*

[2] The superior court's Order can be found at CP 119-124. A copy is also attached in the Appendix, at A 1-6.

2. The superior court erred by entering Finding of Fact 2.2 in its order dated September 7, 2006.

3. The trial court erred by denying the Department's Motion to Supplement the Record in its order dated September 7, 2006.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a person is committed to a state hospital for mental health evaluation and treatment under RCW 10.77.090, does RCW 10.01.160 or Const. art. 1 § 22 preclude the Department from recovering the costs incurred in evaluating and treating his mental illness? (Assignment of Error No. 1).

2. Whether substantial evidence supports the superior court's finding that the "sole purpose" of Mr. Utter's initial commitment to Western State Hospital under RCW 10.77.090 was to "restore [his] competency to proceed to trial," when there no evidence that treatment provided to persons committed under RCW 10.77.090 is limited in this manner and omits pertinent language from the commitment order. (Assignment of Error No. 2).

3. In a judicial review proceeding under the Administrative Procedures Act, RCW 34.05, where the person challenging an agency action claims that the action is contrary to statute or constitutional right, does a superior court err by denying a motion to supplement the record

with evidence responding to a question of fact raised by the court at oral argument? (Assignment of Error No. 3).

IV. STATEMENT OF THE CASE

A. Statement of Facts

The facts leading to the Department's determination of Utter's financial responsibility for a portion of the costs of his hospitalization are not in dispute.

Mr. Utter was charged in Clark County Superior Court with one count of felony harassment and one count of fourth-degree assault on January 21, 2004. AR 1, 56-57.[3] Due to the nature of the charges, the trial court ordered that Mr. Utter undergo a mental health evaluation to determine if he was competent to stand trial.[4] AR 1, 58-60.

Upon reviewing the results of Mr. Utter's mental health evaluation, the court determined there was reason to doubt his competency to stand trial and entered an order committing him to WSH for up to 90 days of mental health evaluation and treatment pursuant to RCW 10.77.090(1)(b).[5] AR 1-2, 61-62. WSH admitted Mr. Utter on April 7, 2004. AR 2, 65.

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[3] Pursuant to RAP 9.7(c), the clerk of the trial court transmitted the administrative record to this court. Citation to these records is by the relevant page number(s) in the administrative record (AR).

[4] Under RCW 10.77.010(14), an incompetent defendant is one who "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense *as a result of a mental disease or defect.*" (Emphasis added.)

[5] A copy of RCW 10.77.090 is attached in the Appendix, at A 7-8.

Before the initial 90-day commitment period ended, the court entered an order pursuant to RCW 10.77.090(3) committing Mr. Utter to WSH for an additional 90 days of mental health evaluation and treatment. AR 2, 63-64. Mr. Utter was transferred back to the Clark County Jail on October 1, 2004. AR 2, 65. On October 20, 2004, the Clark County Superior Court found Mr. Utter incompetent to stand trial, and entered an order pursuant to RCW 10.77.090(4) committing him to WSH for up to 180 days of mental health evaluation and treatment. AR 2, 68-70. At the end of this 180-day commitment, Mr. Utter remained incompetent. CP 6; RP (May 5, 2006) at 8, ll. 19-24. Accordingly, the criminal charges against him were dismissed, and he was subsequently committed to WSH through the civil commitment process under RCW 71.05.[6] CP 6, 121 ¶ 2.4; RP (May 5, 2006) at 8, ll. 19-24.

During his initial commitment in September 2004, the Department assessed Mr. Utter's financial resources and, using the methodology set forth in WAC 388-855, determined that he had an ability to contribute $5.28 per day toward the cost of his hospitalization at WSH.[7] AR 2, 51. The Department notified Mr. Utter of this determination by serving him with a Notice and Finding of Responsibility (NFR) on September 8, 2004.

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[6] This appeal does not concern the Department's authority to seek reimbursement from Mr. Utter for costs associated with evaluating and treating his mental illness after his commitment to WSH under RCW 71.05.

[7] A copy of WAC 388-855 is attached in the Appendix, at A 9-14.

AR 2, 50, 52. At the same time, he was advised of his right to request an administrative hearing. AR 50.

B. Administrative Procedure and Decision

Mr. Utter timely filed a request for an administrative hearing, challenging the Department's assessment of his "ability to pay for hospitalization costs." AR 2, 35. Due to a reduction in Mr. Utter's income in November 2004, the Department agreed to seek reimbursement only for services provided to him for an approximate seven-month period, from April 7, 2004 to November 1, 2004. AR 31. Accordingly, Mr. Utter's total financial obligation under the NFR was $770.88.[8] AR 12.

Mr. Utter, however, did not dispute that he had an ability to contribute $5.28 per day toward the cost of his hospitalization. AR 6. Rather, he challenged the Department's authority to seek any reimbursement, reasoning that RCW 10.01.160[9] and Const. art. I, § 22[10]

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[8] In contrast, the actual cost incurred by the Department in evaluating and treating Mr. Utter's mental illness during the time period of April 7, 2004 through October 31, 2004 was $85,007.31. AR 4, 71. With respect to Mr. Utter's 180-day commitment pursuant to RCW 10.77.090(4), the Department incurred costs in excess of $56,341.96 in evaluating and treating Mr. Utter's mental illness. AR 71.

The Department also sought reimbursement from Mr. Utter's Medicare benefits for the care and treatment provided to him. AR 50.

[9] RCW 10.01.160 provides, in relevant part:

(1) The court [in a criminal proceeding] may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant [...].

(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant [...]. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial [...].

[10] Const. art. I, § 22 provides, in relevant part,"[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel [...]. In no

preclude reimbursement unless and until he is convicted of the criminal charges against him. AR 20-29. Mr. Utter's sole request for relief before the administrative law judge was that "his debt for cost of care at Western State Hospital be set to zero." AR 29.

In a decision dated April 29, 2005, the administrative law judge upheld the Department's determination of financial responsibility. AR 1-7. However, notwithstanding Mr. Utter's lack of objection to the calculations, the administrative law judge recalculated Mr. Utter's financial responsibility after determining that his income had decreased in May 2004, instead of November 2004. AR 2-3, ¶¶ 8-9. As a result, the administrative law judge recalculated Mr. Utter's financial responsibility, finding that he had an obligation to reimburse the Department $290.40 for the costs of his hospitalization. AR 5-7, ¶¶ 6-9.[11]

C. Petition for Judicial Review

On May 24, 2005, Mr. Utter filed a petition for judicial review in Thurston County Superior Court. CP 127-28. In his petition and subsequent argument, Mr. Utter did not claim that the administrative law judge's findings or conclusions were erroneous with regard to his ability to pay. The sole request in Mr. Utter's petition was that the court "reverse

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instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

[11] Neither the Department nor Mr. Utter contend that the administrative law judge erred in recalculating Mr. Utter's liability.

the decision of the Administrative Law Judge and find that KEITH UTTER have no liability for cost of care at Western State Hospital while in a criminal competency proceeding." AR 128, ¶ 8. Mr. Utter's brief on judicial review further requested that the superior court "declare that the statutory and regulatory scheme by which the Department determines patients financially responsible for state hospital commitment costs [to be] in violation of RCW 10.01.160 and Const. art. I, § 22 where the purpose of the state hospital commitment is to assess and restore a defendant's competency to stand trial on criminal charges." CP 5.

The superior court reversed the administrative decision and invalidated Mr. Utter's NFR on both statutory and constitutional grounds. CP 122-24; RP (May 5, 2006) at 40; RP (June 30, 2006) at 9. Specifically, the court found that RCW 10.01.160 and Const. art. I, § 22 preclude recovery of the cost of mental health treatment provided to Mr. Utter, because he had not been convicted of the charges against him at the time the Department issued Mr. Utter's NFR. CP 122-123, ¶¶ 3.1-3.6. The superior court then enjoined the Department from seeking reimbursement from Mr. Utter for his cost of his care while committed under RCW 10.77.090. CP 123, ¶ 4.1. In addition, the Court invalidated the provisions of WAC 388-855 "as applied in the case of criminal defendants committed to the state hospital pursuant to RCW 10.77 for the

purpose of restoring the defendant's competency to stand trial on pending criminal charges and not thereafter convicted on said charges." CP 123-24, ¶ 4.2.

The superior court entered its final order on September 7, 2006. CP 119-125. The Department filed a timely notice of appeal on October 3, 2006. CP 118.

D. Department's Motion to Supplement the Record

As noted above, Mr. Utter's petition for judicial review raised arguments about constitutional barriers to his responsibility to reimburse the Department for the cost of his hospitalization. In particular, his challenge to the as-applied validity of WAC 388-855 was not cognizable at the administrative hearing level and no record had been developed on this issue. During oral argument on May 5, 2006, the superior court expressed a mistaken belief that mental health treatment provided to patients committed for evaluation and treatment under RCW 10.77.090 was qualitatively different than that provided to other patients at state hospitals. RP (May 5, 2006) at 20-21 ("[T]hey only need to treat him enough to make him competent. They don't need to make him well. ... So it seems to me that the treatment provided is really only to allow them to be competent in that window of time."). This erroneous belief appeared to influence the superior court's ultimate decision, which effectively treats

WSH as a branch of criminal prosecution, rather than a provider of medical services.

In response to the superior court's comments and to demonstrate the fallacy of the court's belief, the Department moved to supplement the administrative record with the Declaration of Dr. Ira Klein, M.D.[12] CP 57-58. The declaration explained the nature of treatment provided to patients committed under RCW 10.77.090. CP 48-52. Specifically, Dr. Klein explained that there is no fundamental difference between the treatment provided to patients committed under RCW 10.77.090 and that provided to other committed patients at state hospitals. CP 49-52. Dr. Klein further explained that the role of WSH, with respect to all patients, is to provide them with them with mental health treatment for their particular mental illness. CP 49-52.

While Mr. Utter objected to the Department's motion on procedural grounds, he did not dispute the veracity of Dr. Klein's declaration. CP 93-97. Nonetheless, the superior court denied the Department's Motion to Supplement the Record. RP (Sept. 1, 2006) at 4; CP 119.

[12] At the time his declaration was filed with the superior court, Dr. Klein was the Medical Director at WSH. Dr. Klein's declaration can be found at CP 48-52; a copy is also attached in the Appendix at A 15-19.

V. SUMMARY OF ARGUMENT

This Court should reverse the superior court decision, which is premised on errors of law, and uphold the Department's determination that Mr. Utter is financially responsible for a portion of the cost of his hospitalization while committed to WSH under RCW 10.77.090.

Under Washington law, persons committed to a state hospital under RCW 10.77.090 and who are financially able to contribute to the cost of their mental health treatment have an obligation to reimburse the Department for the cost of their hospitalization. Two statutes require persons committed to a state hospital under RCW 10.77.090 to contribute to the cost of their hospitalization. First, 43.20B.330 provides that all persons admitted or committed to a state hospital have an obligation to pay toward the cost of care, to the extent resources allow, regardless of the basis for commitment:

> Any person admitted or committed to a state hospital for the mentally ill, and their estates and responsible relatives are liable for reimbursement to the state of the costs of hospitalization and/or outpatient services [...].

RCW 43.20B.330. Moreover, RCW 10.77.250 specifically authorizes the Department to seek reimbursement for the cost of care of persons committed to state hospitals under RCW 10.77.

> The department [of social and health services] shall be responsible for all costs relating to *the evaluation and treatment of persons committed to it pursuant to any provisions of this chapter*, and the logistical and supportive services pertaining thereto. *Reimbursement may be obtained by the department pursuant to RCW 43.20B.330.*

RCW 10.77.250 (emphasis added).

The superior court erred by accepting Mr. Utter's argument that RCW 10.01.160 and Const. art. I, § 22, prohibit the Department from seeking reimbursement. RCW 10.01.160 refers only to the imposition of costs of prosecution upon a convicted defendant, which has no application to Mr. Utter's financial responsibility for his hospitalization because the independent medical treatment provided by the Department is not a cost of prosecution. Even if it was, the express provisions of RCW 10.77.250 and RCW 43.20B.330 specifically provide for collection of this medical cost and apply notwithstanding any implication that Mr. Utter draws from RCW 10.01.160.

Const. art. I, § 22 provides express rights for accused persons, including a right to "appear and defend," and prohibits compelling the payment of money to secure such rights. The superior court erred by construing the constitutional prohibition against trying an incompetent criminal defendant as including an affirmative right to receive mental health treatment at taxpayer expense. Moreover, payment for

hospitalization, whether for mental health treatment or for other medical needs, is not imposed on a criminal defendant as a precondition to exercise of the right not to be tried while incompetent.

VI. ARGUMENT

A. Standard of Review

The Administrative Procedures Act (APA), RCW 34.05, governs judicial review of administrative decisions including the decision of the Department before this court. RCW 34.05.570; *Burnham v. Dep't of Social & Health Servs.*, 115 Wn. App. 435, 438, 63 P.3d 816 (2003). In reviewing an administrative decision, an appellate court sits in the same position as the superior court and applies the APA standards directly to the agency's administrative record; no deference is owed to the superior court. *Burnham*, 115 Wn. App. at 438; *Waste Management of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633-34, 869 P.2d 1034 (1994) ("in reviewing adjudicative proceedings, review by an appellate court is to be on the agency record without consideration of the findings and conclusions of the superior court").

The standard for review of agency orders in adjudicative proceedings is set forth in RCW 34.05.570(3). This includes judicial review for allegations that an agency order violates a constitutional provision or a statutory provision:

> The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
>
> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> ....
>
> (d) The agency has erroneously interpreted or applied the law....

RCW 34.05.570(3).

The appellate court engages in a *de novo* review of the legal conclusions reached by the administrative tribunal. *Burnham*, 115 Wn. App. at 438. Appellate courts, however, grant substantial weight to an agency's interpretation of an ambiguous statute that the agency administers. *Public Util. Dist. 1 of Pend Oreille Cy. v. Dep't of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). This is especially true when the agency has expertise in a certain subject area. *Inland Empire Distrib. Sys., Inc. v. Utils. & Transp. Comm'n*, 112 Wn.2d 278, 770 P.2d 624 (1989). Courts also will give substantial weight to an agency's interpretation of its own rules. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993).

Mr. Utter must demonstrate the invalidity of the agency action, which in this case requires a showing that it was error to apply the agency's financial responsibility laws to his hospitalization under RCW 10.77.090. RCW 34.05.570(1)(a); *Washington Indep. Tel. Ass'n v. Utils.*

& Transp. Comm'n, 148 Wn.2d 887, 903, 64 P.3d 606 (2003). Mr. Utter cannot make this showing because "[a]dministrative rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented." *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004). When a party alleges that a rule or statute is unconstitutional, that party must prove unconstitutionality beyond a reasonable doubt. *Longview Fibre Co. v. Dep't of Ecology,* 89 Wn. App. 627, 632-633, 949 P.2d 851 (1998).

Mr. Utter cannot demonstrate error in the Department's order assessing his financial responsibility.

B. Persons Committed To A State Hospital For Evaluation and Treatment Under RCW 10.77.090 Must Contribute To The Cost Of Their Hospitalization When Financially Able

All persons committed to a state hospital, including those committed under RCW 10.77.090, have an express obligation under RCW 43.20B.330 and 10.77.250 to contribute to the cost of their hospitalization. Mr. Utter argues that RCW 10.01.160 conflicts with and supercedes these statutes and precludes the Department from seeking reimbursement from persons committed to a state hospital for mental health treatment pursuant to RCW 10.77.090. Nothing in the language or purpose of RCW 10.01.160 prohibits the Department from seeking reimbursement for the

cost of evaluating and treating a mental illness at a state hospital, and therefore there is no conflict. Moreover, even if RCW 10.01.160 could be read to create a conflict, the interpretation fulfilling legislative intent is that the specific statutes addressing financial responsibility apply, notwithstanding the general provisions of RCW 10.01.160.

1. All Persons Committed To A State Hospital Have An Obligation To Reimburse the Department For The Cost Of Their Hospitalization

As a threshold matter, Washington law expressly provides that all persons committed to a state hospital, including those committed under RCW 10.77.090, have an obligation, to they extent they are able, to reimburse the Department for the cost of their hospitalization.

RCW 43.20B.330 provides, in relevant part:

> *Any person admitted or committed to a state hospital for the mentally ill*, and their estates and responsible relatives are liable for reimbursement to the state of the costs of hospitalization and/or outpatient services....

(Emphasis added.) Mr. Utter cannot plausibly deny that this statute describes him.

Second, the Department is expressly authorized to seek reimbursement for the costs of treatment and evaluation provided to persons committed to a state hospital under RCW 10.77:

> The department [of social and health services] shall be responsible for all costs relating to the evaluation and treatment of persons committed to it pursuant to any provisions of this chapter, and the logistical and supportive

> services pertaining thereto. *Reimbursement may be obtained by the department pursuant to RCW 43.20B.330.*

RCW 10.77.250. (Emphasis added.) *See also Musselman v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 841, 847, 134 P.3d 248 (2006) ("In the context of services provided to the mentally ill, all persons committed to Western State Hospital are liable for reimbursement to DSHS for the costs of their hospitalization."); *Kolbeson v. Dep't of Soc. & Health Servs.*, 129 Wn. App. 194, 197, 118 P.3d 901 (2005) (a patient at Western State Hospital is liable to reimburse the State for the cost of hospitalization). Mr. Utter again cannot plausibly deny that RCW 10.77.250 expressly provides that he is financially responsible for the cost of his hospitalization at WSH.

Nor is there an express exemption for Mr. Utter, in contrast to the express statutory exception (not applicable here) that applies when funds from a criminally insane perpetrator must first be applied to compensate an affected victim. *Musselman*, 132 Wn. App. at 848 (citing RCW 43.20B.335).[13] *See generally Seattle Sch. Dist. No. 1 v. Int'l Union of Operating Eng'rs*, 88 Wn. App. 205, 212, 944 P.2d 1062 (1997) (express exceptions in a statute construed to preclude other exceptions).

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[13] *See* RCW 43.20B.360 ("No statutes of limitations shall run against the state of Washington for hospitalization charges: PROVIDED, HOWEVER, That periods of limitations for the filing of creditors' claims against probate and guardianship estates shall apply against such claims.").

In reviewing statutes, the courts' objective is to ascertain and carry out the Legislature's intent. *E.g., Dep't of Ecology v. Campbell and Guinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Where the language of a statute is plain and unambiguous, courts must construe the statute according to the statutory language alone. *Id.*

Not only are the statutory provisions clear, they reflect long-standing legislative intent that all persons committed to a state hospital have an obligation to contribute to the cost of their hospitalization. *See e.g.,* Rem. Rev. Stat. § 6930 (Laws of 1923, p. 466 § 1 ("every insane person ... shall pay therefore the sum of $4.50 per week during the time such insane person is committed to a state hospital for the insane...")); Laws of 1877, p. 649 § 1 (superintendent of state hospital required to investigate the financial resources of each patient committed to the facility to determine whether "friends and family are able to defray the expenses of care").[14]

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[14] In addition, RCW 43.20B.320 expressly provides that persons committed to a state hospital after having been adjudicated not guilty by reason of insanity (NGRI) on criminal charges are liable for the cost of their hospitalization. Voluntary patients at state hospitals are also liable for the cost of their hospitalization under RCW 72.23.120. Persons involuntarily detained for mental health treatment at facilities not operated by the Department are also liable for their cost of care. RCW 71.05.100.

With respect to other residential facilities operated by the Department, the Legislature has provided that residents are responsible to contribute to the cost of care, to the extent their resources allow. *See* RCW 13.40.220 (juvenile offenders); RCW 43.20B.410 (persons with developmental disabilities); RCW 71.09.110 (sexually violent predators).

Finally, the conclusion that the Legislature intended for these statutory provisions to apply to *all* persons committed to a state hospital is supported by Laws of 1987, ch. 75 § 13, which broadened the scope of RCW 43.20B.330.[15] Until 1987, RCW 43.20B.330 specifically limited the application of the statute applied to persons committed to a state hospital pursuant to RCW Title 71, RCW 10.76 (which has since been recodified at RCW 10.77), and RCW 72.23.070. These specific statutory cross-references were stricken by Laws of 1987, ch. 75 § 13 and replaced with the clear and unambiguous statement that "any person admitted or committed to a state hospital for the mentally ill" has an obligation to reimburse the Department for the cost of hospitalization. The only logical conclusion is that the Legislature intended for RCW 43.20B.330 to apply to *all* persons at state hospitals, regardless of the statutory basis for admission or commitment.

2. Costs Of "Emergency" Or "Necessary" Medical Care Provided To Criminal Defendants

The Legislature's intent that persons committed to state hospitals under RCW 10.77.090 contribute to the cost of their hospitalization is not unique. The Legislature also enacted statutes authorizing government

[15] A copy of Laws of 1987, ch. 75 is attached in the Appendix, at A 20-31.

agencies to recover the costs of "emergency" or "necessary" medical care provided to criminal defendants awaiting prosecution.

It is well-established that prisoners, including convicted inmates and persons awaiting trial, have a constitutional right to be provided with "necessary" and/or "emergency" medical care, and this care must be provided at public expense if the prisoner is indigent. *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). While the obligation to provide such care exists, states are left with broad discretion to determine who bears financial responsibility.

Under Washington law, the costs of "emergency" or "necessary" medical care provided to "jail inmates" are initially borne by local government agencies. RCW 70.48.130.[16] However, RCW 70.48.130 provides that the government agency paying for "emergency" or "necessary" medical care may seek reimbursement directly from the "jail inmate" as well as from any insurance or other benefit program also providing coverage. If necessary, a government agency may file suit against a "jail inmate" to secure reimbursement of such medical costs.

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[16] RCW 70.48.130 is best interpreted as applicable to all "jail inmates," including persons who have yet to be arraigned on any criminal charge. *See* AGO 2005 No. 8.

RCW 10.77.250 is directly analogous to RCW 70.48.130 and accomplishes the same legislative purpose—that government agencies recover the costs of medical care provided to criminal defendants awaiting prosecution. These statues clearly express the Legislature's intent that criminal defendants are not entitled to receive medical treatment at taxpayer expense when they have financial resources to pay for needed medical care while in custody. Moreover, there is no logical explanation for why financial responsibility for mental health treatment should be treated any differently than financial responsibility for treatment for a heart attack or any other physical illness.

3. Costs Incurred By The Department In Evaluating And Treating A Mental Illness Are Not "Expenses Specially Incurred By The State In Prosecuting The Defendant" Under RCW 10.01.160

Despite the express statutory provisions analyzed above, Mr. Utter argued and the superior court concluded that RCW 10.01.160 prohibits the Department from seeking reimbursement for the cost of hospitalization when it treats criminal defendants committed to a state hospital under RCW 10.77.090. CP 119-124, ¶¶ 3.1-3.6, 4.1-4.2. RCW 10.01.160 provides in relevant part:

> (1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant....
>
> (2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant....They cannot

include expenses inherent in providing a constitutionally guaranteed jury trial....

The crux of Mr. Utter's argument is that the cost incurred by the Department in providing mental health treatment constitute "expenses specially incurred by the state in prosecuting" him. Based on this assumption, he claims he cannot be financially responsible for the cost of his hospitalization because he has not been convicted of the charges against him. CP 11. Mr. Utter can cite no legal authority in support of this contention, and only offers a conclusory assertion that his hospitalization costs "clearly" constitute costs prohibited by RCW 10.01.160.[17] CP 12.

The plain language of RCW 10.01.160 therefore does not preclude the Department from recovering what is allowed by the express provisions of RCW 10.77.250 and RCW 43.20B.330. RCW 10.01.160(1) provides that a convicted defendant may be required to pay "costs." RCW 10.01.160(2) defines "costs" as being only those "expenses specially incurred by the state in prosecuting the defendant."[18] Nothing in this language suggests that it is intended to displace the express provisions of RCW 10.77.250 and RCW 43.20B.330.

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[17] Just as there is no Washington authority supporting Mr. Utter's contention that the costs of mental health treatment at a state hospital constitute "costs" under RCW 10.01.160, there is no Washington authority concluding that the costs of "necessary" and/or "emergency" medical treatment provided to criminal defendants constitute "costs" under RCW 10.01.160.

[18] RCW 10.01.160(2) also identifies certain "costs" that may be imposed, including the costs for preparing and serving a warrant for failing to appear in court, costs of incarceration and court-ordered legal financial obligations.

Moreover, RCW 10.01.160(2) refers to "prosecuting" but does not define the term or otherwise indicate that the costs of hospitalization, even under RCW 10.77.090, constitute a cost of prosecution. When a statute does not define a term, the rules of statutory construction require that a reviewing court give the term its plain and ordinary meaning as found in a standard dictionary. *E.g.*, *McClarty v. Totem Elec.*, 157 Wn.2d 214, 225, 137 P.3d 844 (2006). In common parlance, the term "prosecuting" refers to that portion of a criminal proceeding that leads to a determination of guilt or innocence of the crime charged. Indeed, the ordinary meaning of the verb "to prosecute," is "to institute legal proceedings against; *esp:* to accuse of some crime." *Webster's Third New Int'l Dictionary* 1820 (unabridged ed. 2002). "Prosecution" ordinarily refers to "the institution and continuance of a criminal suit involving the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment on behalf of the state or government." *Id.* Similarly, in legal parlance the meaning of the verb "to prosecute," is "[t]o institute and pursue a criminal action against (a person)," whereas "prosecution" refers to "[a] criminal proceeding in which an accused person is tried." *Black's Law Dictionary* 1237 (7th ed. 1999).

Consistent with these definitions, the costs incurred by WSH when it evaluates and treats a mental illness do not constitute "expenses specially incurred by the state in prosecuting" a criminal defendant under RCW 10.01.160. That is because the Department is not involved in the prosecution of criminal defendants. The Department is an independent

agency, not controlled or directed by the prosecution, and not involved in any of the decisions or discretion of criminal prosecution. Naturally, the Department was also not involved in the court proceedings against Mr. Utter in Clark County Superior Court.[19]

The trial court did not commit Mr. Utter to determine his guilt or innocence, or as a punishment or penalty for his alleged criminal behavior. Rather, the trial court sought to have the Department evaluate and treat Mr. Utter's mental illness. *See* RCW 10.77.2101 (memorializing the Legislature's intent that decisions as to the mental health treatment provided to persons committed to a state hospital under RCW 10.77 be based on the nature of their particular mental illness, not the criminal charges against them).[20] Accordingly, the costs incurred by the Department are not "expenses specially incurred by the state in prosecuting" a criminal defendant. The Department is more accurately described as evaluating and subsequently treating a mental illness, which is incidental to a criminal prosecution.

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[19] Similarly, there is no support for Mr. Utter's contention that the cost of his hospitalization "clearly" constitutes an "expense inherent in providing a constitutionally guaranteed jury trial." CP 12. As discussed more fully below, criminal defendants do not have a constitutional right to receive mental health treatment at taxpayer expense. *See infra* pp. 29-32.

[20] *See also* RCW 10.77.120 (the Department "shall provide adequate care and treatment" to persons committed under RCW 10.77); RCW 10.77.210 ("Any person involuntarily detained, hospitalized, or committed pursuant to the provisions of this chapter shall have the right to adequate care and individualized treatment"); *In re J.S.*, 124 Wn.2d 689, 700-701, 880 P.2d 976 (1994) (persons detained in state facilities have a substantive liberty interest in receiving adequate and individualized treatment) (citing *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982)).

Oregon courts have construed Oregon Revised Statutes (ORS) 161.665—the statute upon which RCW 10.01.160 is modeled—in the same manner referred to above. In 1976, ORS 161.665 provided, in pertinent part:

> (1) The court may require a convicted defendant to pay costs.
>
> (2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.[21]

In construing ORS 161.665, the Oregon courts consistently hold that the phrase "expenses specially incurred by the state in prosecuting" encompasses only those "costs" which are incurred by the relevant law enforcement agency, court and prosecuting entity in those criminal proceedings that lead to a determination of guilt or innocence of the crime charged. *See State v. Flajole*, 204 Or. App. 295, 301-2, 129 P.3d 770 (2006) (concluding that the term "prosecuting" in ORS 161.665 limited

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[21] As currently written, the pertinent language in ORS 161.665(1) provides:

> [T]he court, only in the case of a defendant for whom it enters a judgment of conviction, may include in its sentence thereunder a provision that the convicted defendant pay as costs expenses specially incurred by the state in prosecuting the defendant. [...] Costs do not include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

the scope of the statute to only those costs related to the proceedings by which the defendant was found guilty); *State v. Heston*, 74 Or. App. 631, 634-35, 704 P.2d 541 (1985) (concluding that the prohibition in ORS 161.665 encompassed only those costs "specially incurred" by the local law enforcement agency, the local prosecutor and the federal Department of Justice). S*ee also* AGO 1974 No. 14 at 3 (noting that, as enacted, RCW 10.01.160 was identical to ORS 161.665); *State v. Barklind*, 87 Wn.2d 814, 818, 557 P.2d 314 (1976) (same); *State v. Carroll*, 81 Wn.2d 95, 110, 500 P.2d 115 (1972) (the adoption of a statute of another state carries with it the construction placed upon such statute by the courts of that state).

This Court should similarly conclude that the prohibition against the imposition of costs of prosecution under RCW 10.01.160 does not encompass the cost of evaluating and treating a patient's mental illness while committed to a state hospital under RCW 10.77.090. Therefore, because the cost of hospitalization at WSH does not constitute a cost of prosecution, RCW 10.01.160 provides no relevant defense to Mr. Utter's financial responsibility. The superior court's conclusion to the contrary should be reversed.

4. To The Extent That RCW 10.77.250 And RCW 43.20B.330 Conflict With RCW 10.01.160, The More Specific Statutes Expressly Requiring Payment Of Treatment Costs Must Control

Even if the costs of hospitalization at WSH might arguably be construed as a "cost" under RCW 10.01.160, thus creating a conflict with

the Department's authority under RCW 43.20B.330 and RCW 10.77.250, the Legislature's intent should be determined by applying the rule of construction that the more specific statute prevails. *See Waste Management of Seattle, Inc. v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994); *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001).

At best, RCW 10.01.160 provides only a general description of the court's power to impose costs of prosecution, with no express or specific mention of the cost of hospitalization. By contrast, RCW 43.20B.330 unequivocally and specifically provides that *all* persons admitted or committed to a state hospital have an obligation to contribute to the cost of their hospitalization. In addition, RCW 10.77.250 specifically provides that the Department may seek reimbursement from persons for all costs "relating to the evaluation and treatment of persons committed" to a state hospital pursuant to RCW 10.77. To the extent RCW 10.01.160 presents a conflict with the Department's authority under RCW 43.20B.330 and RCW 10.77.250, the latter statutes should prevail.[22]

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[22] Not only is this interpretation a matter of common sense, but it is clear that this is what the Legislature intended when it specifically adopted statutes imposing an obligation on those charged with a crime to pay for "medical treatment" and "mental health treatment." If the Legislature had intended to include the costs associated with medical and mental health treatment as "expenses specially incurred by the state in prosecuting" criminal defendants, then it would not have adopted RCW 43.20B.330, 10.77.250 and 70.48.130. *See JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 10, 891 P.2d 720

5. Similarly, Other States Require Persons Committed To State Hospitals For Evaluation And Treatment To Restore Competency To Contribute To The Cost Of Their Hospitalization

Courts in other states consistently hold that criminal defendants committed to state hospitals for evaluation and treatment may be required to contribute to the costs of their hospitalization.

Colorado - *Estate of Carlson v. Colorado State Hospital*, 749 P.2d 993, 995 (1987) (patient committed for treatment to restore competency held liable for cost of hospitalization);

Connecticut - *State v. Kosiorek*, 259 A.2d 151, 153 (1969) (defendant committed after a finding of incompetency held liable for cost of hospitalization; no part of the period during which defendant was committed to state hospital was in any way related to sentence for crime, nor to detention by reason of the alleged commission of any crime, and neither the state nor the taxpayers should be burdened with the costs of providing mental health treatment to a defendant who was financially able to pay);

Florida - *Ozbourn v. State*, 651 So.2d 795, 798 (1995) (liability for costs of hospitalization extends to both forensic and civil patients);

New Hampshire - *In re Sargent*, 354 A.2d 404, 407 (1976) (all persons committed to a state hospital are liable for the cost of their hospitalization);

Illinois - *Estate of Schneider v. Dep't of Mental Health*, 277 N.E.2d 870, 872 (1971) (defendant committed to a state hospital after a finding of incompetency held liable for cost of hospitalization; imposition of such costs "was neither an imposition of any penalty, nor was it based upon any finding of guilt of a crime, but rather was the result of a finding as to mental condition, and the commitment was of the same nature and substance as a commitment in a civil proceeding");

(1995) (noting the basic tenet of statutory construction that the Legislature does not pass meaningless acts).

Ohio - *State v. Griffith*, 36 N.E.2d 489, 492 (1941) (defendant found incompetent to stand trial liable for the cost of treatment to restore competency, as no part of his commitment can be related to "any sentence for a crime nor to any retention by reason of alleged commission of crime");

North Carolina - *State ex rel. Dorothea Dix Hospital v. Davis*, 232 S.E.2d 698, 702-03 (1977) (defendant committed to a state hospital after being found incompetent held liable for cost of hospitalization);

Tennessee - *Cox v. State*, 439 S.W.2d 267, 271-72 (1969) (estate of person found incompetent to stand trial held liable for the cost of hospitalization, rejecting defendant's contention that the nature of his commitment was "essentially criminal"); and

Virginia - *Commonwealth v. Jenkins*, 297 S.E.2d 692, 694-95 (1982) (defendant committed to a state hospital for care and treatment after finding of incompetency held liable for cost of hospitalization).

Washington's statutes are thus consistent with national policy and similar laws in other states. This Court should therefore affirm that persons committed to WSH under RCW 10.77.090, including Mr. Utter, have an obligation to reimburse the Department for the cost of their hospitalization and reverse the superior court's contrary conclusions of law.

C. A Criminal Defendant Does Not Have A Constitutional Right To Receive Mental Health Treatment At Taxpayer Expense, Despite His Ability To Contribute To The Cost of Hospitalization

Mr. Utter argues that the Department's attempt to obtain reimbursement for the cost of his hospitalization violates Const. art. I, § 22 because he, in essence, is being compelled to "advance money or fees" to

secure his constitutional right to "appear and defend." Const. art. I, § 22, provides, in relevant part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ... In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

The right to "appear and defend" ensures only that a person is not tried while incompetent. It does not imply or provide criminal defendants with a constitutional right to receive mental health treatment at taxpayer expense in order to restore competency. Imposing financial responsibility on Mr. Utter for the mental health treatment provided at WSH therefore does not impair his right to "appear and defend" under Const. art. I, § 22. Nor does the financial responsibility violate his right not to be tried while incompetent.

1. The Rights of Criminal Defendants Under Const. Art. I, § 22 Do Not Include A Right To Mental Health Treatment At Taxpayer Expense

Mr. Utter does not contend that he cannot afford to pay the minimal financial amount assessed against him. Instead, Mr. Utter contends that Const. art. I, § 22 grants criminal defendants an affirmative right to mental health treatment to restore competency, regardless of their own financial abilities. CP 13-19.

The Department, of course, recognizes that that a criminal defendant has the right under Const. art. I, § 22 to "appear and defend" which extends to the right not to be tried while incompetent. *State ex rel.*

MacKintosh v. Superior Court, 45 Wn. 248, 253-55, 88 P. 207 (1907); RCW 10.77.050 ("No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues."). The purpose of a defendant's right not to be tried while incompetent is to ensure that he has the capacity to understand the nature of the proceedings against him and to afford him the opportunity to assist in his own defense. *MacKintosh*, 45 Wn. at 253-55 ("If the prisoner with his hands or feet manacled cannot have a fair trial, within the meaning of the Constitution, how can it be contended that he can have such fair trial when his mind is fettered?"). Accordingly, a criminal defendant's Const. art. I, § 22 right to "appear and defend" incorporates a *prohibition* against trying a criminal defendant while incompetent.[23] Thus, a criminal defendant's right to not be tried while incompetent is simply that, he cannot proceed to trial. In this sense, Const. art. I, § 22 is prohibitive. But this case does not involve a financial charge on Mr. Utter which must be paid in order to avoid being tried while incompetent—he cannot allege nor prove that he was at any risk of being tried while incompetent. This case is simply about whether Mr. Utter has any financial responsibility for the mental health treatment provided to him by the Department.

The superior court erred by converting the prohibition of Const. art. I, § 22 into an affirmative right to receive mental health treatment, that

[23] This prohibition has been codified at RCW 10.77.050, which provides that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues."

may or may not restore him to competency at taxpayer expense. Nothing in Washington's constitutional or common law history suggests that Const. art. I, § 22 was intended to give criminal defendants an affirmative right to receive treatment for their mental illness at taxpayer expense. *See MacKintosh*, 45 Wn. at 253-55 (discussing the common-law history behind the *prohibition* against trying incompetent defendants). Rather, Const. art. I, § 22 does no more than bar trial of Mr. Utter while he remains incompetent.

Because Const. art. I, § 22, does not create any affirmative right to receive mental health treatment, the superior court erred by concluding that it barred the Department from seeking reimbursement from Mr. Utter for the cost of his hospitalization.

2. Mr. Utter Was Not Obligated To Reimburse The Department In Order To "Secure" His Constitutional Right Not To Proceed To Trial While Incompetent

As discussed above, Const. art. I, § 22, provides that criminal defendants shall not, before final judgment, be "compelled to advance money or fees to secure the rights herein guaranteed," including their right to "appear and defend"—to not proceed to trial while incompetent. Mr. Utter argues that the Department violated Const. art. I, § 22 by seeking reimbursement for the cost of his hospitalization at WSH prior to final judgment.

Mr. Utter's contention is fundamentally flawed, however, because at no point during the criminal proceedings was he compelled to reimburse the Department in order to "secure" his Const. art. I, § 22 right to "appear and defend"—to not proceed to trial while incompetent. Mr. Utter's constitutional right was neither lost nor conditioned upon reimbursement of the Department for the cost of his hospitalization. Moreover, Mr. Utter was not denied mental health treatment at WSH because of any inability or unwillingness to reimburse the Department for the cost of his hospitalization. Indeed, Mr. Utter never proceeded to trial because, after two 90-day commitments and a subsequent 180-day commitment to WSH for mental health treatment, Mr. Utter remained mentally ill and, therefore, incompetent, and the criminal charges against him were dismissed.

The superior court thus erred by concluding that requiring Mr. Utter to reimburse the Department for the costs of his hospitalization would deprive Mr. Utter of his constitutional right not to proceed to trial while incompetent. It further erred by conceiving of the financial obligation as a condition on Mr. Utter's constitutional rights. Because Mr. Utter was not required to reimburse the Department in order to "secure" his right not to proceed to trial, the Department's issuance of an NFR to him did not violate Const. art. I, § 22.

The Washington State Supreme Court rejected a similar challenge in *State v. Ashbaugh*, 90 Wn.2d 432, 435-36, 583 P.2d 1206 (1978). In *Ashbaugh*, the Supreme Court considered a criminal defendant's claim that requiring him to pay a filing fee to pursue an appeal violated his right to "appear and defend" under Const. art. I, § 22. The Supreme Court rejected this claim, first reasoning that an appellate filing fee is imposed after final judgment, and thus is not prohibited by Const. art. I, § 22. The Court also noted, however, that a criminal defendant does not lose his constitutional right to an appeal because of an inability to pay a filing fee, and that nothing in the Washington Constitution conferred upon criminal defendants the right to a free appeal, regardless of an ability to pay. *Ashbaugh*, 90 Wn.2d at 435-36.

Similarly, Mr. Utter has not lost his constitutional right to "appear and defend" under Const. art. I, § 22 due to any inability to reimburse the Department for the cost of his hospitalization, nor was he denied mental health treatment due to any such inability. Mr. Utter has not been "compelled to advance money or fees" to secure his rights under Const. art. I, § 22. *Ashbaugh*, 90 Wn.2d at 435. Nor can any aspect of Const. art. I, § 22 be construed as conferring upon Mr. Utter a right to mental health treatment at taxpayer expense.

D. The Superior Court Erred In Entering Finding Of Fact 2.2 And Abused Its Discretion In Refusing To Consider The Declaration Of Dr. Klein

As shown above, the superior court erred in its legal conclusions regarding RCW 10.01.160 and Const. art. I, § 22. This Court does not need to reach the issues in this section to reverse the superior court and affirm the administrative decision below. The superior court erred, however, by entering Finding of Fact 2.2, because it is not supported by substantial evidence and perpetuates the court's misconception as to the nature and quality of treatment provided at WSH. RP (May 5, 2006) at 20-21 ("[T]hey only need to treat him enough to make him competent. They don't need to make him well. ... So it seems to me that the treatment provided is really only to allow them to be competent in that window of time."). Moreover, the superior court erred by refusing to admit and consider the Declaration of Dr. Klein, which sought to correct this misperception.

1. Finding Of Fact 2.2 Is Not Supported By Substantial Evidence

An appellate court generally applies the APA standards of review to the agency's administrative record without consideration of the findings and conclusions of the superior court. *Burnham*, 115 Wn. App. at 438; *Waste Management*, 123 Wn.2d at 633-34. This appeal is different from

most appeals under the APA, however, in that Mr. Utter challenged the validity of WAC 388-855 for the first time on judicial review. Moreover, he raised constitutional challenges under RCW 34.05.570(3)(a) which the court considered based on its assumptions regarding treatment.

The superior court's ruling was based in part on Finding of Fact 2.2:

> On 3/24/2004, the Clark County Superior Court determined, based on an initial psychiatric assessment, that there was reason to doubt Mr. Utter's competency to understand the proceedings against him and to assist in his own defense. The court ordered Mr. Utter committed to Western State Hospital for up to 90 days. *The sole stated purpose of the initial 90-day state hospital commitment was "to restore defendant's competency to proceed to trial" on the criminal charges against him.* Mr. Utter was admitted to Western State Hospital on 4/7/2004.

CP 121, ¶ 2.2 (emphasis added). To the extent this finding implies that the treatment or purposes of treatment provided by WSH are somehow different because of the criminal court's commitment, it is error and lacks substantial evidence.

Under the APA's "substantial evidence" standard, a finding of fact will be upheld if supported by "evidence that is substantial when viewed *in light of the whole record before the court.*" RCW 34.05.570(3)(e) (emphasis added). "Substantial evidence" has been defined as evidence in sufficient quantum to persuade a fair minded person of the truth of the

declared premise. *See, e.g., Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 903 P.2d 433 (1995); *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994).

Here, the superior court found that the "sole purpose" of Mr. Utter's initial commitment to WSH was to "restore [his] competency to proceed to trial." CP 121, ¶ 2.2; AR 61. There is no evidence that this is the limit of mental health treatment at WSH, and this finding reflects only the superior court's extrapolation from the commitment order. Moreover, it fails to reflect the actual order committing Mr. Utter to WSH, which provides that the purpose of the commitment was to allow him to "*undergo evaluation and treatment* to restore [his] competency to proceed to trial." AR 61. By omitting this pertinent language, Finding of Fact No. 2.2 mischaracterizes the "sole purpose" of Mr. Utter's commitment to WSH as stated in the original order of commitment.[24]

To the extent Finding of Fact 2.2 is material to resolution of Mr. Utter's claims under RCW 10.01.160 and Const. art. I, § 22, it is not supported by substantial evidence.

[24] With respect to Mr. Utter's second 90-day commitment, the superior court incorporated all of the pertinent language from the order of commitment and correctly found that the purpose of Mr. Utter's commitment was "*evaluation and treatment* to restore [his] competency to stand trial." CP 121, ¶ 2.3 (emphasis added); AR 63.

2. The Superior Court Erred By Refusing To Admit And Consider The Declaration of Dr. Klein

The superior court's error in entering Finding of Fact No. 2.2. was exacerbated by its failure to admit and consider the Declaration of Dr. Klein. Generally, judicial review of agency action under the APA is confined to the agency record. RCW 34.05.558. However, on judicial review the superior court may receive evidence beyond the agency record if it relates to the validity of the agency action at the time it was taken and is necessary to decide issues regarding (1) the possibility of disqualifying those who took the agency action; (2) unlawfulness of the procedure; or (3) material facts in rule making, brief adjudication, or other proceedings not required to be decided on the agency record. RCW 34.05.562(1). Furthermore, a superior court facing a constitutional argument about an agency action or rule for the first time on appeal is unlikely to confront a record that fully explores the constitutional issues. In such circumstances, the superior court of necessity must be able to accept evidence relevant to that subject.

Under the APA, a superior court's refusal to supplement the record with new evidence is reviewed under the "abuse of discretion" standard. *Okamoto v. Employment Security Dep't*, 107 Wn. App. 490, 494-95, 27

P.3d 1203 (2001), *rev. den'd*, 145 Wn.2d 1022 (2002) (citations omitted). A trial court abuses discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* Here, the superior court's refusal to consider the Declaration of Dr. Ira Klein, M.D. constitutes a manifest abuse of discretion because it was based on untenable grounds. The Department submitted Dr. Klein's declaration to correct the superior court's mistaken belief that the nature of the mental health treatment provided to persons committed under RCW 10.77.090 is qualitatively different from that provided to other patients at state hospitals. CP 57-58. As such, Dr. Klein's declaration met the standards under RCW 34.05.562 for supplementing the record on judicial review—the evidence offered pertained to a disputed issue of material fact, raised only by the superior court, and formed the basis of the superior court's decision. Moreover, although Mr. Utter objected to Dr. Klein's declaration on procedural grounds, he did not dispute its veracity as to the nature and quality of treatment provided at WSH. CP 93-97.

By addressing facts about the nature and purpose of treatment that were not based on substantial evidence in the agency record, and by refusing to consider the undisputed evidence offered by the Department, the superior court abused its discretion. To the extent Finding 2.2 is material to resolution of Mr. Utter's claims under RCW 10.01.160 and

Const. art. I, § 22, it is error based on the record as it exists, and error in light of the Declaration of Dr. Klein, which should have been considered before entering Findings on such matters.

VII. CONCLUSION

For the reasons stated above, the Court should reverse the decision of the superior court and uphold the Department's determination that Mr. Utter is financially responsible for a portion of the costs incurred by the Department in evaluating and treating his mental illness at WSH. In addition, the Court should reverse the superior court's conclusion that the Department's rules in WAC 388-855 are invalid as applied to persons committed under RCW 10.77.090.

RESPECTFULLY SUBMITTED this 2nd day of January, 2007.

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CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Appellant on all parties or their counsel of record on the date below as follows:

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☒ **Hand delivered by Julie Raichart**

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of January, 2007, at Tumwater, Washington.

Laurie Carley, Legal Assistant

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SUPERIOR COURT
THURSTON COUNTY WASH

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SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

KEITH UTTER

Petitioner

vs

DEPARTMENT OF SOCIAL AND HEALTH SERVICES ("DSHS")

Respondent

No 05-2-00999-1

ORDER ON RESPONDENT'S MOTIONS TO SUPPLEMENT THE RECORD AND FOR RECONSIDERATION, &

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION & FINAL ORDER on JUDICIAL REVIEW OF ADMINISTRATIVE DECISION

Clerk's Action Required

The court, having considered the parties' briefing, hereby DENIES respondent Washington State Department of Social and Health Services' post-trial motion to supplement the record On respondent Washington State Department of Social and Health Services' motion for reconsideration of the *Findings of Fact, Conclusions of Law and Decision & Final Order on Judicial Review of Administrative Decision* issued in this matter on June 30, 2006, the court, having considered the parties' briefing and oral argument, hereby issues the following *Amended Findings of Fact, Conclusions of Law, and Decision & Final Order on Judicial Review of Administrative Decision*

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I Introduction

This is an action brought pursuant to Chapter 34 05 RCW for judicial review of a Final Order issued by the Washington State Office of Administrative Hearings for the Department of Social and Health Services Petitioner Keith Utter seeks reversal of this final agency order that he must pay $290 for two 90-day state hospital competency assessment and restoration commitments

Petitioner also seeks an order from this court invalidating on state constitutional and statutory grounds the DSHS regulations by which the department determines patient financial responsibility for state hospital commitment costs as applied in cases in which the purpose of the state hospital commitment is to assess and restore a criminal defendant's competency to stand trial on pending criminal charges

The Court has read and considered the briefing submitted by the parties, and the full administrative record in this case as filed with the Court On May 5, 2006, the Court heard oral argument on the merits Petitioner is represented by Todd Carlisle of the Northwest Justice Project Respondent DSHS is represented by Assistant Attorney General Ian Bauer

Based on its review of the record, the briefs of the parties and argument of counsel at the hearing, the Court issued an oral ruling at the conclusion of argument The Court now enters the following Findings of Fact, Conclusions of Law, and Decision & Final Order on Judicial Review, which sets aside the Final Order at issue in this case, and invalidates DSHS regulations contained in WAC Chapter 388-855, including the formula for computing individual patient liability for state hospital care, as applied in a case in which the state hospital commitment is for the purpose of assessing and restoring a criminal defendant's competency to stand trial on pending criminal charges

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II Findings of Fact

The following Findings of Fact are evident from the record and are not contested by the parties

2 1 On 1/21/2004, Petitioner Keith Utter was charged in Clark County Superior Court with one count of felony harassment, and one count of fourth degree assault

2 2 On 3/24/2004, the Clark County Superior Court determined, based on an initial psychiatric assessment, that there was reason to doubt Mr Utter's competency to understand the proceedings against him and to assist in his own defense The court ordered Mr Utter committed to Western State Hospital for up to 90 days The sole stated purpose of the initial 90-day state hospital commitment was "to restore defendant's competency to proceed to trial" on the criminal charges against him Mr Utter was admitted to Western State Hospital on 4/7/2004

2 3 On 7/2/2004, because there remained reason to doubt Mr Utter's competency to understand the proceedings against him and assist in his own defense, the Clark County Superior Court entered another order committing him to Western State Hospital for an additional 90 days The sole stated purpose of the second 90-day state hospital commitment was again "evaluation and treatment to restore defendant's competency to proceed trial " The second 90- day competency restoration commitment ended on 10/1/2004

2 4 Mr Utter's competency to proceed to trial on the criminal charges against him was not restored His case did not proceed to trial He was neither convicted nor acquitted of the criminal charges against him Following his competency restoration commitments, he was subsequently civilly committed to Western State Hospital

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2 5 On 9/8/2004, the DSHS Office of Financial Recovery sent Mr Utter a "Notice and Finding of Responsibility" asserting that he must pay for a portion of his Western State Hospital competency restoration commitment costs Using the formula in WAC Chapter 388-855 for determining state hospital patient financial responsibility, Mr Utter was charged $770 88 for his competency restoration treatment from the date of his admission to Western State Hospital, 4/7/2004, through the end of his second 90 day competency restoration commitment, 10/1/2004

2 6 Mr Utter appealed the agency's determination that he must pay for his state hospital competency restoration commitment An administrative law judge re-computed and reduced the amount that Mr Utter was ordered to pay The Final Order, issued April 29, 2005, reduced the amount to $290 40

III Conclusions of Law

3 1 Petitioner's claim that the department's regulations by which it determines patient financial responsibility for state hospital commitment costs violates RCW 10 01 160 and Wash Const Article I Section 22 as applied in his case are properly before this court in these proceedings to be decided *de novo*

3 2 The general revenue recovery statute that authorizes charging state hospital patients for the cost of their care is limited in this case by the specific prohibition in RCW 10 01 160(1) against imposing pre-conviction costs on a criminal defendant The prohibition in RCW 10 01 160 controls any apparent conflict between it and the general cost of care revenue recovery statute because RCW 10 01 160 is the more specific statute addressing and protecting the individual rights of the discrete subgroup of state hospital patients who are criminal defendants

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3 3 The agency regulations contained in WAC Chapter 388-855 by which DSHS determines patient financial responsibility for state hospital commitment costs violate RCW 10 01 160 as applied in Petitioner Utter's case

3 4 Article I, Section 22 of the Washington State Constitution describes the rights of defendants in state court criminal proceedings As applied in this case, this constitutional provision prohibits any state effort before final judgment of the trial court in a criminal case to compel payment from a criminal defendant for the cost of a state hospital commitment to restore the defendant's competency to stand trial

3 5 The regulations contained in Chapter 388-855 WAC by which DSHS determines patient financial responsibility for state hospital commitment costs violate Wash Const Article I, Section 22 as applied in Petitioner Utter's case

3 6 In this action brought pursuant to Chapter 34 05 RCW for judicial review of a final agency order, Petitioner's request for an order invalidating an agency rule as applied in his case is properly before this court pursuant to RCW 35 05 570(2)(a)

IV Decision & Order

4 1 The Final Order dated April 29, 2005, issued by the Washington State Office of Administrative Hearings for the Department of Social and Health Services, In re Keith Utter, Docket No 10-2004-B-0403, is hereby set aside DSHS is enjoined from compelling Petitioner to contribute towards the costs of his state hospital competency restoration commitments from April 7, 2004 through October 1, 2004

4 2 DSHS rules contained in WAC Chapter 388-855 governing the determination of patient financial responsibility for state hospital commitment costs are hereby declared invalid as applied in the case of criminal defendants committed to the state hospital pursuant to

Northwest Justice Project
715 Tacoma Avenue South
Tacoma Washington 98402
Phone (253) 272 7879 Fax (253) 272-8226

RCW Chapter 10 77 for the purpose of restoring the defendant's competency to stand trial on pending criminal charges and not thereafter convicted on said charges

Dated 9/7/06

Judge Christopher Wickham

Presented by

Attorney for Petitioner

Northwest Justice Project
Todd Carlisle, WSBA no 25208

Approved as to form & Notice of Presentation waived by

Attorney for Respondent

Assistant Attorney General
Ian M Bauer, WSBA no 35563

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RCW 10.77.090

Stay of proceedings — Commitment — Findings — Evaluation, treatment — Extensions of commitment — Alternative procedures — Procedure in nonfelony charge.

(1)(a) If at any time during the pendency of an action and prior to judgment the court finds, following a report as provided in RCW 10.77.060, a defendant is incompetent the court shall order the proceedings against the defendant be stayed except as provided in subsection (7) of this section.

(b) If the defendant is charged with a felony and determined to be incompetent, the court shall commit the defendant to the custody of the secretary, who shall place such defendant in an appropriate facility of the department for evaluation and treatment, or the court may alternatively order the defendant to undergo evaluation and treatment at some other facility as determined by the department, or under the guidance and control of a professional person, until he or she has regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense, but in any event, for no longer than a period of ninety days.

(c) A defendant found incompetent shall be evaluated at the direction of the secretary and a determination made whether the defendant is developmentally disabled. Such evaluation and determination shall be accomplished as soon as possible following the court's placement of the defendant in the custody of the secretary. When appropriate, and subject to available funds, if the defendant is determined to be developmentally disabled, he or she may be placed in a program specifically reserved for the treatment and training of persons with developmental disabilities where the defendant shall have the right to habilitation according to an individualized service plan specifically developed for the particular needs of the defendant. The program shall be separate from programs serving persons involved in any other treatment or habilitation program. The program shall be appropriately secure under the circumstances and shall be administered by developmental disabilities professionals who shall direct the habilitation efforts. The program shall provide an environment affording security appropriate with the charged criminal behavior and necessary to protect the public safety. The department may limit admissions of such persons to this specialized program in order to ensure that expenditures for services do not exceed amounts appropriated by the legislature and allocated by the department for such services. The department may establish admission priorities in the event that the number of eligible persons exceeds the limits set by the department. A copy of the report shall be sent to the facility.

(d)(i) If the defendant is:

(A) Charged with a nonfelony crime and has: (I) A history of one or more violent acts, or a pending charge of one or more violent acts; or (II) been previously acquitted by reason of insanity or been previously found incompetent under this chapter or any equivalent federal or out-of-state statute with regard to an alleged offense involving actual, threatened, or attempted physical harm to a person; and

(B) Found by the court to be not competent; then

(C) The court shall order the secretary to place the defendant: (I) At a secure mental health facility in the custody of the department or an agency designated by the department for mental health treatment and restoration of competency. The placement shall not exceed fourteen days in addition to any unused time of the evaluation under RCW 10.77.060. The court shall compute this total period and include its computation in the order. The fourteen-day period plus any unused time of the evaluation under RCW 10.77.060 shall be considered to include only the time the defendant is actually at the facility and shall be in addition to reasonable time for transport to or from the facility; (II) on conditional release for up to ninety days for mental health treatment and restoration of competency; or (III) any combination of (d)(i)(C)(I) and (II) of this subsection.

(ii) At the end of the mental health treatment and restoration period in (d)(i) of this subsection, or at any time a professional person determines competency has been, or is unlikely to be, restored the defendant shall be returned to court for a hearing. If, after notice and hearing, competency has been restored, the stay entered under (a) of this subsection shall be lifted. If competency has not been restored, the proceedings shall be dismissed. If the court concludes that competency has not been restored, but that further treatment within the time limits established by (d)(i) of this subsection is likely to restore competency, the court may order that treatment for purposes of competency restoration be continued. Such treatment may not extend beyond the combination of time provided for in (d)(i)(C)(I) and (II) of this subsection.

(iii)(A) If the proceedings are dismissed under (d)(ii) of this subsection and the defendant was on conditional release at the time of dismissal, the court shall order the *county designated mental health professional within that county to evaluate the defendant pursuant to chapter 71.05 RCW. The evaluation may be conducted in any location chosen by the professional.

(B) If the defendant was in custody and not on conditional release at the time of dismissal, the defendant shall be detained and sent to an evaluation and treatment facility for up to seventy-two hours excluding Saturdays, Sundays, and holidays for evaluation for purposes of filing a petition under chapter 71.05 RCW. The seventy-two hour period shall commence upon the next nonholiday weekday following the court order, and shall run to the end of the last nonholiday

weekday within the seventy-two hour period.

(iv) If at any time during the proceeding the court finds, following notice and hearing, a defendant is not likely to regain competency, the proceedings shall be dismissed and the defendant shall be evaluated as provided in (d)(iii) of this subsection.

(e) If the defendant is charged with a crime that is not a felony and the defendant does not meet the criteria under (d) of this subsection, the court may stay or dismiss proceedings and detain the defendant for sufficient time to allow the *county designated mental health professional to evaluate the defendant and consider initial detention proceedings under chapter 71.05 RCW. The court must give notice to all parties at least twenty-four hours before the dismissal of any proceeding under this subsection (1)(e), and provide an opportunity for a hearing on whether to dismiss the proceedings.

(2) On or before expiration of the initial ninety-day period of commitment under subsection (1)(b) of this section the court shall conduct a hearing, at which it shall determine whether or not the defendant is incompetent.

(3) If the court finds by a preponderance of the evidence that a defendant charged with a felony is incompetent, the court shall have the option of extending the order of commitment or alternative treatment for an additional ninety-day period, but it must at the time of extension set a date for a prompt hearing to determine the defendant's competency before the expiration of the second ninety-day period. The defendant, the defendant's attorney, or the prosecutor shall have the right to demand that the hearing be before a jury. No extension shall be ordered for a second ninety-day period, nor for any subsequent period as provided in subsection (4) of this section if the defendant's incompetence has been determined by the secretary to be solely the result of a developmental disability which is such that competence is not reasonably likely to be regained during an extension.

(4) For persons charged with a felony, at the hearing upon the expiration of the second ninety-day period or at the end of the first ninety-day period, in the case of a developmentally disabled defendant, if the jury or court finds that the defendant is incompetent, the charges shall be dismissed without prejudice, and either civil commitment proceedings shall be instituted or the court shall order the release of the defendant: PROVIDED, That the criminal charges shall not be dismissed if the court or jury finds that: (a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time. In the event that the court or jury makes such a finding, the court may extend the period of commitment for an additional six months. At the end of the six-month period, if the defendant remains incompetent, the charges shall be dismissed without prejudice and either civil commitment proceedings shall be instituted or the court shall order release of the defendant.

(5) If the defendant is referred to the *county designated mental health professional for consideration of initial detention proceedings under chapter 71.05 RCW pursuant to this chapter, the *county designated mental health professional shall provide prompt written notification of the results of the determination whether to commence initial detention proceedings under chapter 71.05 RCW, and whether the person was detained. The notification shall be provided to the court in which the criminal action was pending, the prosecutor, the defense attorney in the criminal action, and the facility that evaluated the defendant for competency.

(6) The fact that the defendant is unfit to proceed does not preclude any pretrial proceedings which do not require the personal participation of the defendant.

(7) A defendant receiving medication for either physical or mental problems shall not be prohibited from standing trial, if the medication either enables the defendant to understand the proceedings against him or her and to assist in his or her own defense, or does not disable him or her from so understanding and assisting in his or her own defense.

(8) At or before the conclusion of any commitment period provided for by this section, the facility providing evaluation and treatment shall provide to the court a written report of examination which meets the requirements of RCW 10.77.060 (3).

[2000 c 74 § 3; 1998 c 297 § 38; 1989 c 420 § 5; 1979 ex.s. c 215 § 3; 1974 ex.s. c 198 § 8; 1973 1st ex.s. c 117 § 9.]

Notes:

***Reviser's note:** The term "county designated mental health professional" as defined in RCW 10.77.010 was changed to "designated mental health professional" by 2005 c 504 § 106.

Severability -- 2000 c 74: See note following RCW 10.77.060.

Effective dates--Severability -- Intent -- 1998 c 297: See notes following RCW 71.05.010.

Chapter 388-855 WAC

Last Update: 12/6/00

Liability for costs of care and hospitalization of the mentally ill

WAC Sections

388-855-0010
Authority.

The following rules regarding hospitalization charges are hereby adopted under the authority of Title 71 RCW.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, recodified as § 388-855-0010, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 81.02.412 [71.02.412]. 81-08-020 (Order 1627), § 275-16-010, filed 3/25/81. Statutory Authority: RCW 72.01.090. 78-03-029 (Order 1270), § 275-16-010, filed 2/17/78; Order 1, § 275-16-010, filed 2/23/68; Emergency Rules (part), filed 1/26/68, 10/24/67, and 8/2/67.]

388-855-0015
Definitions.

"Adjusted charges" are those [charges levied upon] [amounts charged to] a patient who is or has been confined to a state hospital for the mentally ill, either by voluntary or involuntary admission, and their estates and responsible relatives, which are less than the actual cost of hospitalization as reflected in the schedule of charges herein and which has been established by the issuance of a notice of finding of responsibility.

"Adjusted gross income" is that gross income of the estate of the patient and responsible relatives less any deductions, contributions or payments mandated by law including, but not necessarily limited to, income tax and social security.

"Dependent" means any spouse, minor son or daughter, or permanently disabled son or daughter, of the patient living in the patient's household. If the patient is a minor, then the same definitions shall apply in determining the dependency of members of the parent's household. If a minor son or daughter is not living in the patient's household, that son or daughter shall not be considered a dependent unless the patient is in fact contributing more than fifty percent of that child's support in accordance with a court order or court-recognized agreement.

"Department" means the department of social and health services.

"Determination officer" is that duly appointed and qualified claims investigator who is delegated authority by the secretary to conduct or cause to have conducted an investigation of the financial condition of the estate of the patient and responsible relatives; to evaluate the results of such investigations; to make determinations of the ability to pay hospitalization changes from such investigations and evaluations; and to issue notices of findings of responsibility to the responsible parties.

"Estate of patient and responsible relative" means the total assets available to the patient and his responsible relatives to reimburse the department for hospitalization charges incurred by the patient in a state hospital for the mentally ill in accordance with these regulations.

"Gross income" means the total assets available to the estate of the patient and responsible relatives expressed in terms of their cash equivalent on a monthly basis. The total assets available to the estate of the patient and responsible relatives are converted to a monthly cash equivalent figure by dividing those assets by twelve months. Gross income includes all of the following calculated prior to any mandatory deductions; gross wages for service; net earnings from self-employment; and all other assets divided by twelve months.

"Responsible relative" includes the spouse of a patient, or the parent of a patient who is under eighteen years of age.

"Secretary" means the secretary of the department of social and health services.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, amended and recodified as § 388-855-0015, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 81.02.412 [71.02.412]. 81-08-020 (Order 1627), § 275-16-015, filed 3/25/81.]

Notes:

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules, and deems ineffectual changes not filed by the agency in this manner. The bracketed material in the above section does not appear to conform to the statutory requirement.

388-855-0030
Schedule of charges.

Under RCW 43.20B.325, the department shall base hospitalization charges for patients in state hospitals on the actual operating costs of such hospitals. The department shall require patient's hospitalization charges due and payable on or before the tenth day of each calendar month for services rendered to department patients during the preceding month. A schedule of each hospital's charge rates will be computed under this section based on actual operating costs of the hospital for the previous year. The schedule will be prepared by the secretary's designee, from financial and statistical information contained in hospital records. The schedule will be updated at least annually. All changes under this section shall be prepared in advance of the effective date. Each hospital will make available the schedule of current charge rates upon request.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, recodified as § 388-855-0030, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 43.20B.325. 94-16-048 (Order 3764), § 275-16-030, filed 7/27/94, effective 8/27/94; 93-22-031 (Order 3659), § 275-16-030, filed 10/27/93, effective 11/27/93; 92-17-007 (Order 3434), § 275-16-030, filed 8/6/92, effective 9/6/92; 92-09-118 (Order 3376), § 275-16-030, filed 4/21/92, effective 5/22/92. Statutory Authority: RCW 43.20B.335. 91-21-122 (Order 3267), § 275-16-030, filed 10/23/91, effective 11/23/91; 91-17-064 (Order 3235), § 275-16-030, filed 8/20/91, effective 9/20/91; 91-08-014 (Order 3155), § 275-16-030, filed 3/26/91, effective 4/26/91. Statutory Authority: RCW 43.20B.335 and 71.05.560. 90-18-004 (Order 3061), § 275-16-030, filed 8/23/90, effective 9/23/90. Statutory Authority: RCW 71.02.412. 89-22-128 (Order 2890), § 275-16-030, filed 11/1/89, effective 12/2/89. Statutory Authority: RCW 43.20B.335. 88-21-095 (Order 2715), § 275-16-030, filed 10/19/88. Statutory Authority: RCW 71.02.412. 87-19-026 (Order 2531), § 275-16-030, filed 9/10/87; 86-17-075 (Order 2414), § 275-16-030, filed 8/19/86; 85-17-038 (Order 2273), § 275-16-030, filed 8/15/85; 84-17-011 (Order 2131), § 275-16-030, filed 8/3/84; 83-18-029 (Order 2019), § 275-16-030, filed 8/31/83; 82-17-070 (Order 1866), § 275-16-030, filed 8/18/82; 80-06-087 (Order 1508), § 275-16-030, filed 5/28/80. Statutory Authority: RCW 72.01.090. 79-03-019 (Order 1372), § 275-16-030, filed 2/21/79; 78-03-029 (Order 1270), § 275-16-030, filed 2/17/78; Order 1190, § 275-16-030, filed 2/18/77; Order 1086, § 275-16-030, filed 1/15/76; Order 1002, § 275-16-030, filed 1/14/75; Order 947, § 275-16-030, filed 6/26/74; Order 812, § 275-16-030, filed 6/28/73; Order 14, § 275-16-030, filed 5/11/71; Order 6, § 275-16-030, filed 1/10/69; Order 1, § 275-16-030, filed 2/23/68; Emergency Rules (part), filed 1/26/68, 10/24/67, 8/2/67, and 7/28/67.]

388-855-0035
Available assets of estate of patients and responsible relatives.

(1) The department will include, but not necessarily be limited to, in their determination of the assets of the estates of present and former patients of state hospitals for the mentally ill and their responsible relatives, cash, stocks, bonds, savings, security interests, insurance benefits, guardianship funds, trust funds, governmental benefits, pension benefits and personal property.

(2) Real property shall also be an available asset to the estate: Provided, That the patient's home shall not be considered an available asset if that property is owned by the estate and serves as the principal dwelling and actual residence of the patient, the patient's spouse, and/or minor children and disabled sons or daughters: Provided further, That if the home is not being used for residential purposes by the patient, the patient's spouse, and/or minor children and disabled sons or daughters, and in the opinion of two physicians, there is no reasonable expectancy that the patient will be able to return to the home during the remainder of his life, the home shall be considered an asset available to the estate.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, amended and recodified as § 388-855-0035, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 81.02.412 [71.02.412]. 81-08-020 (Order 1627), § 275-16-035, filed 3/25/81.]

388-855-0045
Exempt income.

Patients whose total resources are insufficient to pay for the actual cost of care shall be entitled to a monthly exemption from income in the amount of forty-one dollars and sixty-two cents or such amount as specified in WAC 388-478-0040.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, amended and recodified as § 388-855-0045, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 72.01.090. 78-03-029 (Order 1270), § 388-16-045 (codified as WAC 275-16-045), filed 2/17/78.]

388-855-0055
Notice and finding of responsibility (NFR) — Appeal procedure.

(1) The determination officer's assessment of the ability and liability of a person or of the person's estate to pay hospitalization charges shall be issued in the form of a notice and finding of responsibility (NFR) as prescribed by RCW 43.20B.340.

(2) When the NFR is for full hospitalization charges as specified under WAC 388-855-0030, the department shall:

(a) Inform the financially responsible person of the current charges; and

(b) Periodically recompute the financially responsible person's charges.

(3) When the NFR is for adjusted charges, the department shall:

(a) Express the charges in a daily or monthly rate; and

(b) Set aside charges for ancillary services.

(4) The right to an adjudicative proceeding to contest the NFR is contained in RCW 43.20B.340.

(a) A financially responsible person wishing to contest the NFR shall, within twenty-eight days of receipt of the NFR:

(i) File a written application for an adjudicative proceeding showing proof of receipt with the Secretary, DSHS, Attn: Determination Officer, P.O. Box 9768, Olympia, WA 98504; and

(ii) Include in or with the application:

(A) A specific statement of the issues and law involved;

(B) The grounds for contesting the department decision; and

(C) A copy of the contested NFR.

(b) The proceeding shall be governed by the Administrative Procedure Act (chapter 34.05 RCW), RCW 43.20B.340, this chapter, and chapter 388-02 WAC. If any provision in this chapter conflicts with chapter 388-02 WAC, the provision in this chapter governs.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, amended and recodified as § 388-855-0055, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 71.05.560. 90-21-030 (Order 3083), § 275-16-055, filed 10/9/90, effective 11/9/90. Statutory Authority: RCW 34.05.220 (1)(a) and43.20B.335 . 90-04-075 (Order 3001), § 275-16-055, filed 2/5/90, effective 3/1/90. Statutory Authority: RCW 81.02.412 [71.02.412]. 81-08-020 (Order 1627), § 275-16-055, filed 3/25/81.]

388-855-0065
Determination of liability.

(1) In determining the ability of the estate of the patient and responsible relative to pay hospitalization charges, first priority shall be given to any third party benefits which might be available. The availability of third party benefits, such as medical insurance, health insurance, Medicare, Medicaid, CHAMPUS, CHAMPVA, shall be considered as an available asset of the estate and shall justify a finding for actual costs of hospitalization during such period as the coverage is in effect.

(2) In the absence of third party benefits, charges shall be based upon the available assets of the estate giving consideration to any unusual and exceptional circumstances and other pertinent factors. No financial determination of the ability of the estate to pay hospitalization charges shall conflict with the eligibility requirements for Medicaid for those patients who are eligible or potentially eligible for such benefits.

(3) The ability of the estate to pay adjusted charges will be determined by applying the following formula:

$$X = (Z\text{-}E)F$$

Where $Z = (A\text{-}Y\text{-}N\text{-}R) \div D$

Z = available income per family member
X = adjusted charges (daily)
A = gross income
Y = mandatory deductions
N = allowance for unusual and exceptional circumstances
R = allowance for other pertinent factors
D = number of dependents
E = exempt income
F = a factor which converts the monthly figures to a daily rate (.0328767).

All calculations are expressed in monthly terms except the final adjusted charge which is converted to a daily rate. All final figures are rounded out to the nearest cent.

(4) The adjusted gross income (A-Y) is determined by first developing the gross income of the estate of the patient and the responsible relative. Gross income (A) includes not only gross wages for services rendered, and/or net earnings from self-employment, but all other available assets which have been divided by twelve months to convert them to a monthly cash equivalent figure. All mandatory deductions (Y), such as income tax and social security, are deducted from the gross income to arrive at the adjusted gross income.

(5) Approved allowances for unusual and exceptional circumstances (N) and for other pertinent factors (R) are then subtracted from the adjusted gross income.

(6) The available income (A-Y-N-R) is then divided by the number of dependents in the household of the patient (D) to determine the available income per family member.

(7) Exempt income (E) as defined in WAC 388-855-0045 is then subtracted from the available income per family member to arrive at the monthly adjusted charges.

(8) The monthly adjusted charges are multiplied by the factor of .0328767 which converts the monthly figure to a daily rate.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, amended and recodified as § 388-855-0065, filed 12/6/00, effective

1/6/01. Statutory Authority: RCW 81.02.412 [71.02.412]. 81-08-020 (Order 1627), § 275-16-065, filed 3/25/81.]

388-855-0075
Unusual and exceptional circumstances.

Unusual and exceptional circumstances for these purposes will cover those expenses other than usual or common; rare and extraordinary; that are of a medical nature and *must* be supplied to the patient for his health, medical or physical well being. Such expenses do not include those expenses that are reimbursable from insurance benefits or can be reasonably obtained from welfare agencies, health maintenance organizations, free clinics, or other free private or governmental sources. The existence and necessity of such unusual and exceptional circumstances must be attested to in writing, by the institution superintendent, that those expenses resulting therefrom are an integral part of the patient's treatment plan and that allowance for such circumstances is necessary for the medical and/or mental well-being of the patient. Upon such written certification, the resources necessary to meet the unusual and exceptional circumstances will not be considered as an asset available to the estate of the patient and responsible relatives for these purposes: Provided, That any such attestation by the institution superintendent must conform with the eligibility criteria of Medicaid if the patient is eligible or potentially eligible for such benefits.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, recodified as § 388-855-0075, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 81.02.412 [71.02.412]. 81-08-020 (Order 1627), § 275-16-075, filed 3/25/81.]

388-855-0085
Other pertinent factors.

The determination officer may consider the following other pertinent factors in determining the ability of the estate of the patient and responsible relatives to pay.

(1) The determination officer may consider those factors related to the well-being, education and training, child support obligations set by court order or by administrative finding under chapter 74.20A RCW, and/or rehabilitation of the patient and the patient's immediate family, to whom the patient owes a duty of support. The patient and/or responsible relatives shall show the existence and the necessity for the pertinent factors as defined. Upon such a showing, the determination officer may consider such resources necessary to reasonably provide for such pertinent factors as assets not available to the estate of the patient and responsible relatives.

(2) Consistent with RCW 43.20B.335, the determination officer shall consider a judgment owed by the patient to any victim of an act that would have resulted in criminal conviction of the patient but for a finding of the patient's criminal insanity. A victim shall include an estate's personal representative who has obtained judgment for wrongful death against the criminally insane patient.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, amended and recodified as § 388-855-0085, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 43.20B.335. 96-18-090, § 275-16-085, filed 9/4/96, effective 10/5/96. 81.02.412 [71.02.412]. Statutory Authority: RCW 81-08-020 (Order 1627), § 275-16-085, filed 3/25/81.]

388-855-0095
Failure to cooperate with department.

Any patient, former patient, guardian, or other responsible party or parties who, after diligent effort by the department, has been shown to have failed to cooperate with the financial investigation by the department; or fails to comply with, or ignores, departmental correspondence; or supplies false or misleading information; or willfully conceals assets or potential assets; will be subject to a determination by the department that the estate of the patient and responsible relatives has the ability to pay full hospitalization charges: Provided, That no person adjudged incompetent by a court of this state at the time of said investigation shall be penalized by his or her actions: Provided further, That such a finding of liability to pay full hospitalization charges shall in no way diminish the responsible party's right to appeal such a finding of responsibility.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, recodified as § 388-855-0095, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 81.02.412 [71.02.412]. 81-08-020 (Order 1627), § 275-16-095, filed 3/25/81.]

388-855-0105
Petition for review.

(1) After a finding of responsibility becomes final in accordance with RCW 43.20B.340, the responsible party may petition for a review of such findings to the secretary. The petitioner must show a substantial change in the financial ability of the estate to pay the charges in a petition for review. The burden of proof of a change in financial ability rests with the petitioner.

(2) A petition for review shall be in writing and to the following address:

Secretary, DSHS

Attn: Determination Officer

P.O. Box 9768 MS HJ-21

Olympia, WA 98504

(3) The determination officer, upon receipt of the petition for review, may conduct or cause to have conducted such investigation as may be necessary to verify the alleged changes in financial status or to determine any other facts which would bear upon the financial ability of the estate to pay.

(4) Based upon the review of the facts, the determination officer may modify or vacate the NFR under the provisions of RCW 43.20B.350.

(5) The NFR will not be modified or vacated, if such modification or vacation inflicts or causes the loss of Medicaid eligibility; jeopardizes the eligibility for other third-party benefits; or has the potential end result of diminishing or jeopardizing the recovery of hospitalization cost by the department without a clear showing of real benefit, financial or otherwise, to the patient and/or responsible relatives.

(6) Nothing herein is intended to preclude the reinvestigation and/or review of the finding of responsibility by the department of its own volition.

[Statutory Authority: RCW 43.20B.335, 43.20B.325, 72.01.090. 01-01-007, recodified as § 388-855-0105, filed 12/6/00, effective 1/6/01. Statutory Authority: RCW 43.20B.335. 90-23-071 (Order 3096), § 275-16-105, filed 11/20/90, effective 12/21/90. Statutory Authority: RCW 81.02.412 [71.02.412]. 81-08-020 (Order 1627), § 275-16-105, filed 3/25/81.]

☐ EXPEDITE
☐ No Hearing is Set
☑ Hearing is Set:
Date: 7/21/06
Time: 9:00 a.m.
The Honorable Chris Wickham

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

KEITH UTTER, Petitioner, v. STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	NO. 05-2-00999-1 DECLARATION OF IRA KLEIN, MD

I, Ira Klein, M.D., being over the age of eighteen years of age and competent to testify to the matters herein, do hereby declare and state as follows:

1. I am the Medical Director of Western State Hospital (WSH). I submit this Declaration in support of Respondent's Motion for Reconsideration, to clarify the role of Western State Hospital in providing treatment to persons committed for competency restoration. In particular, I understand that there is a dispute as to whether the costs incurred by the Department of Social and Health Services in treating persons committed for competency restoration are associated with treatment of a mental illness, or whether such costs are related to that individual's prosecution. I have personal knowledge of the facts set forth herein.

2. I earned a Bachelor of Science with a major in Biology at Wayne State University in Detroit, Michigan in 1967. I earned my Medical Degree from the Wayne State

University, College of Medicine in 1971. From 1971 – 1974 I completed a combined internship and psychiatric residency.

3. My work experience began in private practice as the Managing General Partner of large private practice, in an outpatient group from June 1974 to December 1980. This opportunity provided me with experience in forensic evaluations, inpatient treatment of substance abusers, inpatient therapeutic community outpatient psychotherapy, psychiatric medication clinics, consultation and liaison work with medical facilities, and the ability to work in the Mental Health Center on contract basis.

4. In 1981 I joined Valley Medical Center in the state of Washington, working as the Clinical Program Director, and serving one year as Medical Director of the Psychiatric Unit, and one year as an admitting psychiatrist.

5. I completed a Fellowship in Community Psychiatry from 1984 through 1985. This provided me with training in auditing of agencies and programs, and consultation with public policy areas as well as the opportunity to provide education or consultation for multi-disciplinary therapists at various agencies.

6. I have been employed by Western State Hospital (WSH) since 1985. During that period, I have served as Medical Director on two separate occasions, the most recent being from 2000 through the present.

7. Western State Hospital is one of two state-operated psychiatric hospitals. The primary purpose of Western State Hospital is to provide persons committed to it with mental health treatment, regardless of the basis for that person's commitment (i.e., through civil commitment, the criminal courts or voluntary admission). The route an individual might take in coming to Western State Hospital does not change the underlying purpose of commitment, to provide that individual with mental health care.

8. The reason for this is that Western State Hospital is subject to accreditation and certification standards set by the Joint Commission on Accreditation of Hospitals (JCAHO)

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and the Center for Medicare and Medicaid Services (CMS). Without getting into detail, what this means is that Western State Hospital must continually demonstrate that its patients are receiving treatment for their particular mental illness. Otherwise, Western State Hospital cannot maintain its accreditation and certification as a psychiatric facility.

9. For the purposes of Medicaid, Western State Hospital is designated as an Institute for Mental Diseases (IMD). I understand that an IMD is defined by Congress as a hospital, nursing facility or other institution that is primarily engaged in providing diagnosis, treatment or care to persons with a mental illness. What this means is that CMS has determined that Western State Hospital's primary purpose is to provide care and treatment for the mentally ill.

10. With respect to persons committed for competency restoration, the purpose of commitment remains the same—to treat the individual's underlying mental health disorder. The fact that such a person has been charged with a crime adds an issue for treatment but does not prevent treatment of the underlying mental disorder. After all, if the individual did not need mental health treatment, they would not be kept at Western State Hospital. Similarly, if that person no longer needs mental health treatment, they would be returned to jail immediately.

11. Persons committed for competency restoration treatment receive mental health treatment on a daily basis. Although the focus of treatment may be to restore competency, this doesn't mean that treatment of the underlying disorder is fundamentally different. The treatment provided to persons committed for competency restoration is designed to stabilize the individual's particular mental illness as well as educate them about the legal process. Of course, if all that a patient needed was education about the legal process, they would not be committed to Western State Hospital in the first place. Depending on a patient's particular diagnosis, treatment may include psychopharmalogical understanding groups, the use of psychotropic medications, and daily group therapy sessions. Currently, patients committed

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for competency restoration receive approximately the same hours of treatment as other patients at Western State Hospital.

12. The purpose of commitment in the competency restoration context is underscored by the simple fact that a person committed for competency restoration is unlikely to regain competency if they are not provided mental health treatment. Of course, there is no guarantee that the mental health treatment provided will succeed, just like there is no guarantee that treatment provided to a civil patient will succeed. Nevertheless, the hospital's obligation remains the same, to provide mental health treatment to that person.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this _____ day of July 2006 at _____, Washington.

_____
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12. The purpose of commitment in the competency restoration context is underscored by the simple fact that a person committed for competency restoration is unlikely to regain competency if they are not provided mental health treatment. Of course, there is no guarantee that the mental health treatment provided will succeed, just like there is no guarantee that treatment provided to a civil patient will succeed. Nevertheless, the hospital's obligation remains the same, to provide mental health treatment to that person.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 10 day of July 2006 at Tacoma, Washington.

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1987. If the proposed amendment is not so approved and ratified, this act shall be null and void in its entirety.

Passed the Senate February 2, 1987.
Passed the House April 9, 1987.
Approved by the Governor April 16, 1987.
Filed in Office of Secretary of State April 16, 1987.

CHAPTER 74

[Senate Bill No. 5541]

LIQUOR CONTROL BOARD—CONDITIONS OF ANNUAL AUDIT REVISED

AN ACT Relating to annual audit of the liquor control board; and amending RCW 66.08.024.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 71, chapter 62, Laws of 1933 ex. sess. as last amended by section 2, chapter 5, Laws of 1981 1st ex. sess. and RCW 66.08.024 are each amended to read as follows:

The state auditor shall audit the books, records, and affairs of the board annually((: ~~PROVIDED, That the total annual cost of such audit shall not exceed the sum of thirty thousand dollars. The board shall pay to the state treasurer for the credit of the state auditor, out of the liquor revolving fund, the sum of thirty thousand dollars a year, or so much thereof as is necessary, to defray the costs of such audits~~)). The board may provide for additional audits by certified public accountants. All such audits shall be public records of the state. The payment of the audits provided for in this section shall be paid as provided in RCW 66.08.026 for other administrative expenses.

Passed the Senate March 9, 1987.
Passed the House April 1, 1987.
Approved by the Governor April 16, 1987.
Filed in Office of Secretary of State April 16, 1987.

CHAPTER 75

[Senate Bill No. 5227]

DEPARTMENT OF SOCIAL AND HEALTH SERVICES—REVENUE RECOVERY STATUTES CONSOLIDATED

AN ACT Relating to consolidation of statutes regarding revenue recovery for social and health services; amending RCW 10.77.250, 10.82.080, 18.20.050, 18.46.030, 18.46.040, 43.20A.055, 51.32.040, 70.41.100, 70.62.220, 70.62.230, 70.119.100, 71.02.380, 71.02.411, 71.02.412, 71.02.413, 71.02.414, 71.02.415, 71.05.100, 71.12.470, 71.12.490, 72.23.230, 72.33.180, 72.33.650, 72.33.660, 72.33.665, 72.33.670, 72.33.685, 72.33.690, 72.33.695, 72.33.700, 74.04.005, 74.04.300, 74.04.540, 74.04.550, 74.04.570, 74.04.580, 74.04.710, 74.04.720, 74.08.120, 74.08.338, and 74.09.538; adding a new chapter to Title 43 RCW; recodifying RCW 43.20A.055, 43.20A.435, 43.20A.670, 71.02.320, 71.02.360, 71.02.370, 71.02.380, 71.02.400, 71.02.410, 71.02.411, 71.02.412, 71.02.413, 71.02.414, 71.02.415, 72.33.650, 72.33.655, 72.33.660, 72.33.665, 72.33.670, 72.33.680, 72.33.685, 72.33.690, 72.33.695, 72.33.700, 74.04.007, 74.04.306, 74.04.530, 74.04.540, 74.04.550, 74.04.560, 74.04.570, 74.04.580, 74.04.700, 74.04.710, 74.04.720, 74.04.730, and 74.04.780; and repealing RCW 71.02.310, 71.02.330, 71.02.340, 71.02.350, 71.02.390, and 71.02.417.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 25, chapter 117, Laws of 1973 1st ex. sess. as amended by section 1, chapter 245, Laws of 1985 and RCW 10.77.250 are each amended to read as follows:

The department shall be responsible for all costs relating to the evaluation and treatment of persons committed to it pursuant to any provisions of this chapter, and the logistical and supportive services pertaining thereto. Reimbursement may be obtained by the department pursuant to RCW 71.02.411 as recodified by this 1987 act.

Sec. 2. Section 1, chapter 201, Laws of 1982 as amended by section 2, chapter 245, Laws of 1985 and RCW 10.82.080 are each amended to read as follows:

(1) When a superior court has, as a condition of the sentence for a person convicted of the unlawful receipt of public assistance, ordered restitution to the state of that overpayment or a portion thereof:

(a) The department of social and health services shall deduct the overpayment from subsequent assistance payments as provided in ((~~chapter 74.04~~)) RCW 74.04.700 as recodified by this 1987 act, when the person is receiving public assistance; or

(b) Ordered restitution payments may be made at the direction of the court to the clerk of the appropriate county or directly to the department of social and health services when the person is not receiving public assistance.

(2) However, if payments are received by the county clerk, each payment shall be transmitted to the department of social and health services within forty–five days after receipt by the county.

Sec. 3. Section 5, chapter 253, Laws of 1957 as last amended by section 4, chapter 201, laws of 1982 and RCW 18.20.050 are each amended to read as follows:

Upon receipt of an application for license, if the applicant and the boarding home facilities meet the requirements established under this chapter, the department or the department and the authorized health department jointly, shall issue a license. If there is a failure to comply with the provisions of this chapter or the standards, rules, and regulations promulgated pursuant thereto, the department, or the department and authorized health department, may in its discretion issue to an applicant for a license, or for the renewal of a license, a provisional license which will permit the operation of the boarding home for a period to be determined by the department, or the department and authorized health department, but not to

exceed twelve months, which provisional license shall not be subject to renewal. At the time of the application for or renewal of a license or provisional license the licensee shall pay a license fee as established by the department under RCW 43.20A.055 as recodified by this 1987 act. When the license or provisional license is issued jointly by the department and authorized health department, the license fee shall be paid to the authorized health department. All licenses issued under the provisions of this chapter shall expire on a date to be set by the department, but no license issued pursuant to this chapter shall exceed twelve months in duration: PROVIDED, That when the annual license renewal date of a previously licensed boarding home is set by the department on a date less than twelve months prior to the expiration date of a license in effect at the time of reissuance, the license fee shall be prorated on a monthly basis and a credit be allowed at the first renewal of a license for any period of one month or more covered by the previous license. All applications for renewal of license shall be made not later than thirty days prior to the date of expiration of the license. Each license shall be issued only for the premises and persons named in the application, and no license shall be transferable or assignable. Licenses shall be posted in a conspicuous place on the licensed premises.

Sec. 4. Section 4, chapter 168, Laws of 1951 as amended by section 5, chapter 201, Laws of 1982 and RCW 18.46.030 are each amended to read as follows:

An application for license shall be made to the department upon forms provided by it and shall contain such information as the department reasonably requires, which may include affirmative evidence of ability to comply with rules and regulations as are lawfully prescribed hereunder. Each application for license or renewal of license shall be accompanied by a license fee as established by the department under RCW 43.20A.055 as recodified by this 1987 act: PROVIDED, That no fee shall be required of charitable or nonprofit or government–operated institutions.

Sec. 5. Section 5, chapter 168, Laws of 1951 as amended by section 6, chapter 201, Laws of 1982 and RCW 18.46.040 are each amended to read as follows:

Upon receipt of an application for a license and the license fee, the licensing agency shall issue a license if the applicant and the maternity home facilities meet the requirements established under this chapter. A license, unless suspended or revoked, shall be renewable annually. Applications for renewal shall be on forms provided by the department and shall be filed in the department not less than ten days prior to its expiration. Each application for renewal shall be accompanied by a license fee as established by the department under RCW 43.20A.055 as recodified by this 1987 act. Each license shall be issued only for the premises and persons named in the application and shall not be transferable or assignable except with the written

approval of the department. Licenses shall be posted in a conspicuous place on the licensed premises.

Sec. 6. Section 2, chapter 201, Laws of 1982 and RCW 43.20A.055 are each amended to read as follows:

(1) ((~~The term "license" means that exercise of regulatory authority by the secretary to grant permission, authority, or liberty to do or to forbear certain activities. The term includes licenses, permits, certifications, registrations, and other similar terms.~~

~~(2)~~)) The secretary shall charge fees to the licensee for obtaining a license. Municipal corporations providing emergency medical care and transportation services pursuant to chapter 18.73 RCW shall be exempt from such fees, provided that such other emergency services shall only be charged for their pro rata share of the cost of licensure and inspection, if appropriate. The secretary may waive the fees when, in the discretion of the secretary, the fees would not be in the best interest of public health and safety, or when the fees would be to the financial disadvantage of the state.

((~~(3)~~)) (2) Fees charged shall be based on, but shall not exceed, the cost to the department for the licensure of the activity or class of activities and may include costs of necessary inspection.

((~~(4)~~)) (3) Department of social and health services advisory committees may review fees established by the secretary for licenses and comment upon the appropriateness of the level of such fees.

Sec. 7. Section 13, chapter 2, Laws of 1983 and RCW 51.32.040 are each amended to read as follows:

No money paid or payable under this title shall, except as provided for in RCW 74.04.530 as recodified by this 1987 act or 74.20A.260, prior to the issuance and delivery of the check or warrant therefor, be capable of being assigned, charged, or ever be taken in execution or attached or garnished, nor shall the same pass, or be paid, to any other person by operation of law, or by any form of voluntary assignment, or power of attorney. Any such assignment or charge shall be void, unless the transfer is to a financial institution at the request of a worker or other beneficiary and in accordance with RCW 51.32.045 shall be made: PROVIDED, That if any worker suffers a permanent partial injury, and dies from some other cause than the accident which produced such injury before he or she shall have received payment of his or her award for such permanent partial injury, or if any worker suffers any other injury before he or she shall have received payment of any monthly installment covering any period of time prior to his or her death, the amount of such permanent partial award, or of such monthly payment or both, shall be paid to the surviving spouse, or to the child or children if there is no surviving spouse: PROVIDED FURTHER, That, if any worker suffers an injury and dies therefrom before he or she shall have received payment of any monthly installment covering time loss for any period of time prior to his or her death, the amount of such monthly payment

shall be paid to the surviving spouse, or to the child or children if there is no surviving spouse: PROVIDED FURTHER, That any application for compensation under the foregoing provisos of this section shall be filed with the department or self–insuring employer within one year of the date of death: PROVIDED FURTHER, That if the injured worker resided in the United States as long as three years prior to the date of injury, such payment shall not be made to any surviving spouse or child who was at the time of the injury a nonresident of the United States: PROVIDED FURTHER, That any worker receiving benefits under this title who is subsequently confined in, or who subsequently becomes eligible therefor while confined in any institution under conviction and sentence shall have all payments of such compensation canceled during the period of confinement but after discharge from the institution payment of benefits thereafter due shall be paid if such worker would, but for the provisions of this proviso, otherwise be entitled thereto: PROVIDED FURTHER, That if any prisoner is injured in the course of his or her employment while participating in a work or training release program authorized by chapter 72.65 RCW and is subject to the provisions of this title, he or she shall be entitled to payments under this title subject to the requirements of chapter 72.65 RCW unless his or her participation in such program has been canceled, or unless he or she is returned to a state correctional institution, as defined in RCW 72.65.010(3), as a result of revocation of parole or new sentence: PROVIDED FURTHER, That if such incarcerated worker has during such confinement period, any beneficiaries, they shall be paid directly the monthly benefits which would have been paid to him or her for himself or herself and his or her beneficiaries had he or she not been so confined. Any lump sum benefits to which the worker would otherwise be entitled but for the provisions of these provisos shall be paid on a monthly basis to his or her beneficiaries.

Sec. 8. Section 10, chapter 267, Laws of 1955 as amended by section 9, chapter 201, Laws of 1982 and RCW 70.41.100 are each amended to read as follows:

An application for license shall be made to the department upon forms provided by it and shall contain such information as the department reasonably requires which may include affirmative evidence of ability to comply with the standards, rules, and regulations as are lawfully prescribed hereunder. An application for renewal of license shall be made to the department upon forms provided by it and submitted thirty days prior to the date of expiration of the license. Each application for a license or renewal thereof by a hospital as defined by this chapter shall be accompanied by a fee as established by the department under RCW 43.20A.055 as recodified by this 1987 act.

Sec. 9. Section 3, chapter 239, Laws of 1971 ex. sess. as amended by section 10, chapter 201, Laws of 1982 and RCW 70.62.220 are each amended to read as follows:

The person operating a transient accommodation as defined in this chapter shall secure each year an annual operating license and shall pay a fee therefor as established by the department under RCW 43.20A.055 as recodified by this 1987 act. The annual licensure period shall run from January 1st through December 31st of each year. The license fee shall be paid to the department prior to the time the license is issued and such license shall be conspicuously displayed in the lobby or office of the facility for which it is issued.

Sec. 10. Section 4, chapter 239, Laws of 1971 ex. sess. as amended by section 11, chapter 201, Laws of 1982 and RCW 70.62.230 are each amended to read as follows:

In addition to the annual license fee, the person operating a transient accommodation shall pay an annual inspection fee for any inspection made during the course of the year((~~, if~~)). Fees for inspection shall be as established by the department under RCW 43.20A.055 as recodified by this 1987 act.

Sec. 11. Section 10, chapter 99, Laws of 1977 ex. sess. as last amended by section 8, chapter 292, Laws of 1983 and RCW 70.119.100 are each amended to read as follows:

The issuance and renewal of a certificate shall be subject to the following conditions:

(1) Except as provided in RCW 70.119.090, a certificate shall be issued if the operator has satisfactorily passed a written examination, has paid the department an application fee as established by the department under RCW 43.20A.055 as recodified by this 1987 act, and has met the requirements specified in the rules and regulations as authorized by this chapter.

(2) The terms for all certificates shall be for one year from the date of issuance. Every certificate shall be renewed annually upon the payment of a fee as established by the department under RCW 43.20A.055 as recodified by this 1987 act and satisfactory evidence is presented to the secretary that the operator has fulfilled the continuing education requirements as prescribed by rule of the department.

(3) The secretary shall notify operators who fail to renew their certificates before the end of the certificate year that their certificates are temporarily valid for two months following the end of the certificate year. Certificates not renewed during the two month period shall be invalid and the secretary shall so notify the holders of such certificates.

(4) An operator who has failed to renew a certificate pursuant to the provisions of this section, may reapply for certification and the secretary may require the operator to meet the requirements established for new applicants.

Sec. 12. Section 71.02.380, chapter 25, Laws of 1959 and RCW 71.02.380 are each amended to read as follows:

Patients hospitalized at state hospitals as criminally insane shall be responsible for payment of hospitalization charges ((~~unless an order is obtained pursuant to RCW 71.02.330~~)).

Sec. 13. Section 4, chapter 127, Laws of 1967 ex. sess. as amended by section 64, chapter 292, Laws of 1971 ex. sess. and RCW 71.02.411 are each amended to read as follows:

Any person admitted or committed to a state hospital for the mentally ill ((~~under the provisions of Title 71 RCW or RCW 72.23.070, or chapter 10.76 RCW~~)), and their estates and responsible relatives are liable for reimbursement to the state of the costs of hospitalization and/or outpatient services, as computed by the secretary ((~~of the department of social and health services~~)), or his designee, in accordance with RCW 71.02.410 as recodified by this 1987 act: PROVIDED, That such mentally ill person, and his or her estate, and the husband or wife of such mentally ill person and their estate shall be primarily responsible for reimbursement to the state for the costs of hospitalization and/or outpatient services; and, the parents of such mentally ill person and their estates, until such person has attained the age of eighteen years, shall be secondarily liable.

Sec. 14. Section 5, chapter 127, Laws of 1967 ex. sess. as amended by section 126, chapter 141, Laws of 1979 and RCW 71.02.412 are each amended to read as follows:

The department ((~~of social and health services~~)) is authorized to investigate the financial condition of each person liable under the provisions of RCW 71.02.320 and 71.02.410 through ((~~71.02.417~~)) 71.02.415, as recodified by this 1987 act, and is further authorized to make determinations of the ability of each such person to pay hospitalization charges and/or charges for outpatient services, in accordance with the provisions of RCW 71.02.320 and 71.02.410 through ((~~71.02.417~~)) 71.02.415, as recodified by this 1987 act, and, for such purposes, to set a standard as a basis of judgment of ability to pay, which standard shall be recomputed periodically to reflect changes in the costs of living, and other pertinent factors, and to make provisions for unusual and exceptional circumstances in the application of such standard.

In accordance with the provisions of the Administrative Procedure Act, chapter 34.04 RCW, the department shall adopt appropriate rules and regulations relating to the standards to be applied in determining ability to pay such charges, the schedule of charges pursuant to RCW 71.02.410 as recodified by this 1987 act, and such other rules and regulations as are deemed necessary to administer the provisions of RCW 71.02.320 and 71.02.410 through ((~~71.02.417~~)) 71.02.415, as recodified by this 1987 act.

Sec. 15. Section 6, chapter 127, Laws of 1967 ex. sess. as last amended by section 3, chapter 245, Laws of 1985 and RCW 71.02.413 are each amended to read as follows:

In any case where determination is made that a person, or the estate of such person, is able to pay all, or any portion of the charges for hospitalization, and/or charges for outpatient services, a notice and finding of responsibility shall be served on such person or the court-appointed personal representative of such person. The notice shall set forth the amount the department has determined that such person, or his or her estate, is able to pay not to exceed the costs of hospitalization, and/or costs of outpatient services, as fixed in accordance with the provisions of RCW 71.02.410 as recodified by this 1987 act, or as otherwise limited by the provisions of RCW 71.02.320 and 71.02.410 through ((~~71.02.417~~)) 71.02.415, as recodified by this 1987 act. The responsibility for the payment to the department ((~~of social and health services~~)) shall commence thirty days after service of such notice and finding of responsibility which finding of responsibility shall cover the period from the date of admission of such mentally ill person to a state hospital, and for the costs of hospitalization, and/or the costs of outpatient services, accruing thereafter. The notice and finding of responsibility shall be served upon all persons found financially responsible in the manner prescribed for the service of summons in a civil action or may be served by certified mail, return receipt requested. The return receipt signed by addressee only is prima facie evidence of service. An appeal may be made to the secretary ((~~of social and health services~~)), or the secretary's designee within thirty days from the date of service of such notice and finding of responsibility, upon the giving of written notice of appeal to the secretary ((~~of social and health services~~)) by registered or certified mail, or by personal service. If no appeal is taken, the notice and finding of responsibility shall become final. If an appeal is taken, the execution of notice and finding of responsibility shall be stayed pending the decision of such appeal. Appeals may be heard in any county seat most convenient to the appellant. The hearing of appeal may be presided over by an administrative law judge appointed under chapter 34.12 RCW, and the proceedings shall be recorded either manually or by a mechanical device. At the conclusion of such hearing, the administrative law judge shall make findings of fact and conclusions and recommended determination of responsibility. Thereafter, the secretary, or the secretary's designee, may either affirm, reject, or modify the findings, conclusions, and determination of responsibility made by the administrative law judge. Judicial review of the secretary's determination of responsibility in the superior court, the court of appeals, and the supreme court may be taken in accordance with the provisions of the Administrative Procedure Act, chapter 34.04 RCW.

Sec. 16. Section 7, chapter 127, Laws of 1967 ex. sess. as amended by section 127, chapter 141, Laws of 1979 and RCW 71.02.414 are each amended to read as follows:

Whenever any notice and finding of responsibility, or appeal therefrom, shall have become final, the superior court, wherein such person or persons reside or have property either real or personal, shall, upon application of the secretary ((~~of social and health services~~)) enter a judgment in the amount of the accrued monthly charges for the costs of hospitalization, and/or the costs of outpatient services, and such judgment shall have and be given the same effect as if entered pursuant to civil action instituted in said court.

Sec. 17. Section 8, chapter 127, Laws of 1967 ex. sess. and RCW 71-.02.415 are each amended to read as follows:

The ((~~director~~)) secretary, or ((~~his~~)) the secretary's designee, upon application of the person responsible for payment of reimbursement to the state of the costs of hospitalization, and/or the costs of outpatient services, or the legal representative of such person, and, after investigation, or after investigation without application, the ((~~director~~)) secretary, or ((~~his~~)) the secretary's designee, if satisfied of the financial ability or inability of such person to reimburse the state in accordance with the original finding of responsibility, may, modify or vacate such original finding of responsibility and enter a new finding of responsibility. The determination to modify or vacate findings of responsibility shall be served and be appealable in the same manner and in accordance with the same procedures for appeals of original findings of responsibility.

Sec. 18. Section 15, chapter 142, Laws of 1973 1st ex. sess. as amended by section 4, chapter 24, Laws of 1973 2nd ex. sess. and RCW 71.05.100 are each amended to read as follows:

In addition to the responsibility provided for by RCW 71.02.411 as recodified by this 1987 act, any person, or his estate, or his spouse, or the parents of a minor person who is involuntarily detained pursuant to this chapter for the purpose of treatment and evaluation outside of a facility maintained and operated by the department ((~~of social and health services~~)) shall be responsible for the cost of such care and treatment. In the event that an individual is unable to pay for such treatment or in the event payment would result in a substantial hardship upon the individual or his family, then the county of residence of such person shall be responsible for such costs. If it is not possible to determine the county of residence of the person, the cost shall be borne by the county where the person was originally detained. The department ((~~of social and health services~~)) shall, pursuant to chapter 34.04 RCW, adopt standards as to (1) inability to pay in whole or in part, (2) a definition of substantial hardship, and (3) appropriate payment schedules. Such standards shall be applicable to all county mental health administrative boards. Financial responsibility with respect to department services and facilities shall continue to be as provided in ((~~chapter~~

~~71.02~~)) RCW 71.02.320, 71.02.360, 71.02.370, 71.02.380, and 71.02.410 through 71.02.415, as recodified by this 1987 act.

Sec. 19. Section 71.12.470, chapter 25, Laws of 1959 as amended by section 14, chapter 201, Laws of 1982 and RCW 71.12.470 are each amended to read as follows:

Every application for a license shall be accompanied by a plan of the premises proposed to be occupied, describing the capacities of the buildings for the uses intended, the extent and location of grounds appurtenant thereto, and the number of patients proposed to be received therein, with such other information, and in such form, as the department requires. The application shall be accompanied by the proper license fee. The amount of the license fee shall be established by the department under RCW 43.20A.055 as recodified by this 1987 act.

Sec. 20. Section 71.12.490, chapter 25, Laws of 1959 as last amended by section 15, chapter 201, Laws of 1982 and RCW 71.12.490 are each amended to read as follows:

All licenses issued under the provisions of this chapter shall expire on a date to be set by ((~~[the]~~)) the department of social and health services: PROVIDED, That no license issued pursuant to this chapter shall exceed thirty–six months in duration. Application for renewal of the license, accompanied by the necessary fee as established by the department of social and health services under RCW 43.20A.055 as recodified by this 1987 act, shall be filed with that department, not less than thirty days prior to its expiration and if application is not so filed, the license shall be automatically canceled.

Sec. 21. Section 72.23.230, chapter 28, Laws of 1959 as last amended by section 4, chapter 245, Laws of 1985 and RCW 72.23.230 are each amended to read as follows:

The superintendent of a state hospital shall be the custodian without compensation of such personal property of a patient involuntarily hospitalized therein as may come into the superintendent's possession while the patient is under the jurisdiction of the hospital. As such custodian, the superintendent shall have authority to disburse moneys from the patients' funds for the following purposes only and subject to the following limitations:

(1) The superintendent may disburse any of the funds in his possession belonging to a patient for such personal needs of that patient as may be deemed necessary by the superintendent; and

(2) Whenever the funds belonging to any one patient exceed the sum of one thousand dollars or a greater sum as established by rules and regulations of the department, the superintendent may apply the excess to reimbursement for state hospitalization and/or outpatient charges of such

patient to the extent of a notice and finding of responsibility issued under RCW 71.02.413 as recodified by this 1987 act; and

(3) When a patient is paroled, the superintendent shall deliver unto the said patient all or such portion of the funds or other property belonging to the patient as the superintendent may deem necessary and proper in the interests of the patient's welfare, and the superintendent may during the parole period deliver to the patient such additional property or funds belonging to the patient as the superintendent may from time to time determine necessary and proper. When a patient is discharged from the jurisdiction of the hospital, the superintendent shall deliver to such patient all funds or other property belonging to the patient, subject to the conditions of subsection (2) of this section.

All funds held by the superintendent as custodian may be deposited in a single fund. Annual reports of receipts and expenditures shall be forwarded to the department, and shall be open to inspection by interested parties: PROVIDED, That all interest accruing from, or as a result of the deposit of such moneys in a single fund shall be used by the superintendent for the general welfare of all the patients of such institution: PROVIDED, FURTHER, That when the personal accounts of patients exceed three hundred dollars, the interest accruing from such excess shall be credited to the personal accounts of such patients. All such expenditures shall be accounted for by the superintendent.

The appointment of a guardian for the estate of such patient shall terminate the superintendent's authority to pay state hospitalization charges from funds subject to the control of the guardianship upon the superintendent's receipt of a certified copy of letters of guardianship. Upon the guardian's request, the superintendent shall forward to such guardian any funds subject to the control of the guardianship or other property of the patient remaining in the superintendent's possession, together with a final accounting of receipts and expenditures.

Sec. 22. Section 72.33.180, chapter 28, Laws of 1959 as last amended by section 5, chapter 245, Laws of 1985 and RCW 72.33.180 are each amended to read as follows:

The superintendent of a state school shall serve as custodian without compensation of such personal property of a resident as may be located at the school, including moneys deposited with the superintendent for the benefit of such resident. As such custodian, the superintendent shall have authority to disburse moneys from the resident's fund for the following purposes and subject to the following limitations:

(1) Subject to specific instructions by a donor of money to the superintendent for the benefit of a resident, the superintendent may disburse any of the funds belonging to a resident for such personal needs of such resident as the superintendent may deem proper and necessary.

(2) The superintendent may pay to the department as reimbursement for the costs of care, support, maintenance, treatment, hospitalization, medical care and rehabilitation of a resident from the resident's fund when such fund exceeds one thousand dollars or a greater sum as established by rules and regulations of the department, to the extent of any notice and finding of financial responsibility served upon the superintendent after such findings shall have become final: PROVIDED, That if such resident does not have a guardian, parent, spouse, or other person acting in a representative capacity, upon whom notice and findings of financial responsibility have been served then the superintendent shall not make payments to the department as above provided, until a guardian has been appointed by the court, and the time for the appeal of findings of financial responsibility as provided in RCW 72.33.670 as recodified by this 1987 act shall not commence to run until the appointment of such guardian and the service upon the guardian of notice and findings of financial responsibility.

(3) When a resident is granted placement, the superintendent shall deliver to said resident, or the parent, guardian, or agency legally responsible for the resident, all or such portion of the funds of which the superintendent is custodian as above defined, or other property belonging to the resident, as the superintendent may deem necessary to the resident's welfare, and the superintendent may during such placement deliver to the former resident such additional property or funds belonging to the resident as the superintendent may from time to time deem proper. When the conditions of placement have been fully satisfied and the resident is discharged, the superintendent shall deliver to such resident, or the parent, person, or agency legally responsible for the resident, all funds or other property belonging to the resident remaining in his possession as custodian.

(4) All funds held by the superintendent as custodian may be deposited in a single fund, the receipts and expenditures therefrom to be accurately accounted for by the superintendent: PROVIDED, That all interest accruing from, or as a result of the deposit of such moneys in a single fund shall be credited to the personal accounts of such residents. All such expenditures shall be subject to the duty of accounting provided for in this section.

(5) The appointment of a guardian for the estate of such resident shall terminate the superintendent's authority as custodian of any funds of the resident which may be subject to the control of the guardianship upon receipt by the superintendent of a certified copy of letters of guardianship. Upon the guardian's request, the superintendent shall immediately forward to such guardian any funds subject to the control of the guardianship or other property of the resident remaining in the superintendent's possession together with a full and final accounting of all receipts and expenditures made therefrom.

(6) Upon receipt of a written request from the superintendent stating that a designated individual is a resident of the state school for which he

has administrative responsibility and that such resident has no legally appointed guardian of his estate, any person, bank, corporation, or agency having possession of any money, bank accounts, or choses in action owned by such resident, shall, if the amount does not exceed two hundred dollars, deliver the same to the superintendent as custodian and mail written notice thereof to such resident at the state school. The receipt of the superintendent shall constitute full and complete acquittance for such payment and such person, bank, corporation, or agency making such payment shall not be liable to the resident or his legal representatives. All funds so received by the superintendent shall be duly deposited by him as custodian in the resident's fund to the personal account of such resident.

If any proceeding is brought in any court to recover property so delivered, the attorney general shall defend the same without cost to the person, bank, corporation, or agency effecting such delivery to the superintendent and the state shall indemnify such person, bank, corporation, or agency against any judgment rendered as a result of such proceeding.

Sec. 23. Section 1, chapter 141, Laws of 1967 as amended by section 237, chapter 141, Laws of 1979 and RCW 72.33.650 are each amended to read as follows:

The purpose of RCW 72.33.650 through 72.33.700 as recodified by this 1987 act is to place financial responsibility for cost of care, support and treatment upon those residents of state residential schools who possess assets over and above the minimal amount required to be retained for personal use; to provide procedures for establishing such liability and the monthly rate thereof, and the process for appeal therefrom to the secretary of social and health services and the courts by any person deemed aggrieved thereby.

Sec. 24. Section 3, chapter 141, Laws of 1967 as last amended by section 1, chapter 200, Laws of 1984 and RCW 72.33.660 are each amended to read as follows:

The charges for care, support and treatment as provided in RCW 72.33.655 as recodified by this 1987 act shall be based on the rates established for the purpose of receiving federal reimbursement for the same services. For those services for which there is no applicable federal reimbursement-related rate, charges shall be based on the average per capita costs, adjusted for inflation, of operating each of the state residential schools for the previous reporting year taking into consideration all expenses of institutional operation, maintenance and repair, salaries and wages, equipment and supplies: PROVIDED, That all expenses directly related to the cost of education for persons under the age of twenty-two years shall be excluded from the computation of the average per capita cost. The department shall establish rates on a per capita basis and promulgate those rates or the methodology used in computing costs and establishing rates as rules of the department in accordance with chapter 34.04 RCW. The department shall

be charged with the duty of collection of charges incurred under RCW 72.33.650 through 72.33.700 as recodified by this 1987 act, which may be enforced by civil action instituted by the attorney general within or without the state.

Sec. 25. Section 4, chapter 141, Laws of 1967 as amended by section 3, chapter 118, Laws of 1971 ex. sess. and RCW 72.33.665 are each amended to read as follows:

The department ((~~of social and health services~~)) shall investigate and determine the assets of the estates of each resident of a state residential school and the ability of each such estate to pay all, or any portion of, the average monthly charge for care, support and treatment at a state residential school as determined by the procedure set forth in RCW 72.33.660 as recodified by this 1987 act: PROVIDED, That the sum as set forth in RCW 72.33.180 shall be retained by the estate of the resident at all times for such personal needs as may arise: PROVIDED FURTHER, That where any person other than a resident or the guardian of his estate deposits funds so that the depositor and a resident become joint tenants with the right of survivorship, such funds shall not be considered part of the resident's estate so long as the resident is not the sole survivor among such joint tenants.

Sec. 26. Section 5, chapter 141, Laws of 1967 as last amended by section 6, chapter 245, Laws of 1985 and RCW 72.33.670 are each amended to read as follows:

In all cases where a determination is made that the estate of a resident of a state school is able to pay all or any portion of the charges, a notice and finding of responsibility shall be served on the guardian of the resident's estate, or if no guardian has been appointed then to the resident, the resident's spouse, or other person acting in a representative capacity and having property in his or her possession belonging to a resident of a state school and the superintendent of the state school. The notice shall set forth the amount the department has determined that such estate is able to pay, not to exceed the charge as fixed in accordance with RCW 72.33.660 as recodified by this 1987 act, and the responsibility for payment to the department shall commence thirty days after personal service of such notice and finding of responsibility. Service shall be in the manner prescribed for the service of a summons in a civil action or may be served by certified mail, return receipt requested. The return receipt signed by addressee only is prima facie evidence of service. An appeal from the determination of responsibility may be made to the secretary by the guardian of the resident's estate, or if no guardian has been appointed then by the resident, the resident's spouse, or other person acting in a representative capacity and having property in his or her possession belonging to a resident of a state school, within such thirty day period upon written notice of appeal being served upon the secretary by registered or certified mail. If no appeal is taken, the notice and finding of

responsibility shall become final. If an appeal is taken, the execution of notice and finding of responsibility shall be stayed pending the decision of such appeal. Appeals may be heard in any county seat most convenient to the appellant. The hearing of appeals may be presided over by an administrative law judge appointed under chapter 34.12 RCW and the proceedings shall be recorded either manually or by a mechanical device. Any such appeal shall be a "contested case" as defined in RCW 34.04.010, and practice and procedure shall be governed by the provisions of RCW 72.33.650 through 72-.33.700 as recodified by this 1987 act, the rules and regulations of the department, and the Administrative Procedure Act, chapter 34.04 RCW.

Sec. 27. Section 8, chapter 141, Laws of 1967 as amended by section 241, chapter 141, Laws of 1979 and RCW 72.33.685 are each amended to read as follows:

The charges for care, support, maintenance and treatment of mentally or physically handicapped persons at state residential schools as provided by RCW 72.33.650 through 72.33.700 as recodified by this 1987 act shall be payable in advance on the first day of each and every month to the department ((~~of social and health services~~)).

Sec. 28. Section 9, chapter 141, Laws of 1967 as amended by section 242, chapter 141, Laws of 1979 and RCW 72.33.690 are each amended to read as follows:

The provisions of RCW 72.33.650 through 72.33.700 as recodified by this 1987 act shall not be construed to prohibit or prevent the department of social and health services from obtaining reimbursement from any person liable under RCW 72.33.650 through 72.33.700 as recodified by this 1987 act for payment of the full amount of the accrued per capita cost from any property acquired by gift, devise or bequest subsequent to and regardless of the initial findings of responsibility under RCW 72.33.670 as recodified by this 1987 act: PROVIDED, That the estate of any resident of a state residential school shall not be liable for such reimbursement subsequent to ((~~his~~)) the placement of that resident out of the state residential school: PROVIDED FURTHER, That upon the death of any person while a resident in a state residential school his estate shall become liable to the same extent as the resident's liability on the date of death.

Sec. 29. Section 11, chapter 141, Laws of 1967 and RCW 72.33.695 are each amended to read as follows:

The liabilities created by RCW 72.33.650 through 72.33.700 as recodified by this 1987 act shall apply to the care, support and treatment occurring after July 1, 1967.

Sec. 30. Section 12, chapter 141, Laws of 1967 as amended by section 243, chapter 141, Laws of 1979 and RCW 72.33.700 are each amended to read as follows:

Notwithstanding any other provision of RCW 72.33.650 through 72-.33.700 as recodified by this 1987 act, the secretary may, if in his discretion any resident of a state residential school can be discharged more rapidly therefrom and assimilated into a community, keep an amount not exceeding five thousand dollars in the resident's fund for such resident and such resident shall not thereafter be liable thereon for per capita costs of care, support and treatment as provided for in RCW 72.33.655 as recodified by this 1987 act.

Sec. 31. Section 1, chapter 6, Laws of 1981 1st ex. sess. as last amended by section 2, chapter 335, Laws of 1985 and RCW 74.04.005 are each amended to read as follows:

For the purposes of this title, unless the context indicates otherwise, the following definitions shall apply:

(1) "Public assistance" or "assistance"——Public aid to persons in need thereof for any cause, including services, medical care, assistance grants, disbursing orders, work relief, general assistance and federal–aid assistance.

(2) "Department"——The department of social and health services.

(3) "County or local office"——The administrative office for one or more counties or designated service areas.

(4) "Director" or "secretary" means the secretary of social and health services.

(5) "Federal–aid assistance"——The specific categories of assistance for which provision is made in any federal law existing or hereafter passed by which payments are made from the federal government to the state in aid or in respect to payment by the state for public assistance rendered to any category of needy persons for which provision for federal funds or aid may from time to time be made, or a federally administered needs–based program.

(6) (a) "General assistance"——Aid to persons in need who:

(i) Are not eligible to receive federal–aid assistance, other than food stamps and medical assistance; however, an individual who refuses or fails to cooperate in obtaining federal–aid assistance, without good cause, is not eligible for general assistance; and

(ii) Are either:

(A) Pregnant: PROVIDED, That need is based on the current income and resource requirements of the federal aid to families with dependent children program: PROVIDED FURTHER, That during any period in which an aid for dependent children employable program is not in operation, only those pregnant women who are categorically eligible for medicaid are eligible for general assistance; or

(B) Incapacitated from gainful employment by reason of bodily or mental infirmity that will likely continue for a minimum of sixty days as

independence, to decrease the need for public assistance, or to aid in rehabilitating the applicant or recipient or a dependent of the applicant or recipient; and (ii) the department may provide grant assistance to persons who are otherwise ineligible because of excess real property owned by such persons when they are making a good faith effort to dispose of that property, but the recipient must sign an agreement to dispose of the property and repay assistance payments made to the date of disposition of the property which would not have been made had the disposal occurred at the beginning of the period for which the payments of such assistance were made. In no event shall such amount due the state exceed the net proceeds otherwise available to the recipient from the disposition, unless after nine months from the date of the agreement the property has not been sold, or if the recipient's eligibility for financial assistance ceases for any other reason. In these two instances the entire amount of assistance paid during this period will be treated as an overpayment and a debt due the state, and may be recovered pursuant to RCW 74.04.700 as recodified by this 1987 act.

(11) "Income"——(a) All appreciable gains in real or personal property (cash or kind) or other assets, which are received by or become available for use and enjoyment by an applicant or recipient during the month of application or after applying for or receiving public assistance: PROVIDED, That the department may by rule and regulation exempt income received by an applicant for or recipient of public assistance which can be used by him to decrease his need for public assistance or to aid in rehabilitating him or his dependents, but such exemption shall not, unless otherwise provided in this title, exceed the exemptions of resources granted under this chapter to an applicant for public assistance: PROVIDED FURTHER, That in determining the amount of assistance to which an applicant or recipient of aid to families with dependent children is entitled, the department is hereby authorized to disregard as a resource or income the earned income exemptions consistent with federal requirements: PROVIDED FURTHER, The department may permit the above exemption of earnings of a child to be retained by such child to cover the cost of special future identifiable needs even though the total exceeds the exemptions or resources granted to applicants and recipients of public assistance, but consistent with federal requirements. In formulating rules and regulations pursuant to this chapter the department shall define income and resources and the availability thereof, consistent with federal requirements. All resources and income not specifically exempted, and any income or other economic benefit derived from the use of, or appreciation in value of, exempt resources, shall be considered in determining the need of an applicant or recipient of public assistance.

(b) If, under applicable federal requirements, the state has the option of considering property in the form of lump sum compensatory awards or related settlements received by an applicant or recipient as income or as a resource, the department shall consider such property to be a resource.

(12) "Need"——The difference between the applicant's or recipient's standards of assistance for himself and the dependent members of his family, as measured by the standards of the department, and value of all nonexempt resources and nonexempt income received by or available to the applicant or recipient and the dependent members of his family.

(13) In the construction of words and phrases used in this title, the singular number shall include the plural, the masculine gender shall include both the feminine and neuter genders and the present tense shall include the past and future tenses, unless the context thereof shall clearly indicate to the contrary.

Sec. 32. Section 74.04.300, chapter 26, Laws of 1959 as last amended by section 16, chapter 201, Laws of 1982 and RCW 74.04.300 are each amended to read as follows:

If a recipient receives public assistance and/or food stamps for which he is not eligible, or receives public assistance and/or food stamps in an amount greater than that for which he is eligible, the portion of the payment to which he is not entitled shall be a debt due the state ((~~and shall become a lien against the real and personal property of the recipient from the time of filing by the department with the county auditor of the county where the recipient resides or owns property, and the lien claim has preference over the claims of all unsecured creditors~~)) recoverable under RCW 74.04.306 and 74.04.700 through 74.04.730, as recodified by this 1987 act, and sections 43 and 44 of this 1987 act. It shall be the duty of recipients of public assistance and/or food stamps to notify the department within twenty days of the receipt or possession of all income or resources not previously declared to the department. The department shall advise applicants for assistance that failure to report as required, failure to reveal resources or income, and false statements will result in recovery by the state of any overpayment and may result in criminal prosecution. ((~~When the department determines that the cost of collection is likely to exceed the amount recoverable from any overpayment or the debt is uncollectible, the secretary may waive collection.~~

~~Debts due the state pursuant to the provisions of this section, may be recovered by the state by deduction from the subsequent assistance payments to such persons, lien and foreclosure, order to withhold and deliver, or may be recovered by a civil action instituted by the attorney general.~~))

Sec. 33. Section 2, chapter 102, Laws of 1973 1st ex. sess. as amended by section 8, chapter 245, Laws of 1985 and RCW 74.04.540 are each amended to read as follows:

The lien and notice to withhold and deliver in RCW 74.04.530 as recodified by this 1987 act shall be signed by the secretary or the secretary's

authorized representative and shall identify the recipient of public assistance and time loss compensation, the amount claimed by the department, and the demand to withhold and deliver the sum claimed by the department.

Sec. 34. Section 3, chapter 102, Laws of 1973 1st ex. sess. as amended by section 9, chapter 245, Laws of 1985 and RCW 74.04.550 are each amended to read as follows:

The effective date of the statement of lien and notice to withhold and deliver provided in RCW 74.04.540 as recodified by this 1987 act, shall be the day that it is received by the director of the department of labor and industries, an employee of the director's office of suitable discretion, or a self–insurer as defined in chapter 51.08 RCW: PROVIDED, That service of such statement of lien and notice to withhold and deliver may be made personally or by regular mail, postage prepaid: PROVIDED, FURTHER, That a copy of the statement of lien and notice to withhold and deliver shall be mailed to the recipient at the recipient's last known address by certified mail, return receipt requested, no later than the next business day after such statement of lien and notice to withhold and deliver has been mailed or delivered to the department of labor and industries or to a self–insurer as defined in chapter 51.08 RCW.

Sec. 35. Section 5, chapter 102, Laws of 1973 1st ex. sess. and RCW 74.04.570 are each amended to read as follows:

Any person feeling himself aggrieved by the action of the department of social and health services in impounding his time loss compensation as provided in RCW 74.04.530 through 74.04.580 as recodified by this 1987 act shall have the right to an administrative hearing, which hearing may be conducted by an examiner designated by the secretary for such purpose.

Any such person who desires a hearing shall, within thirty days after the notice to withhold and deliver has been mailed to or served upon the director of the department of labor and industries and said appellant, file with the secretary a notice of appeal from said action.

The hearings conducted shall be in accordance with chapter 34.04 RCW (Administrative Procedure Act).

Sec. 36. Section 6, chapter 102, Laws of 1973 1st ex. sess. and RCW 74.04.580 are each amended to read as follows:

RCW 74.04.530 through 74.04.580 as recodified by this 1987 act shall not apply to persons whose eligibility for benefits under Title 51 RCW, is based upon an injury or illness occurring prior to July 1, 1972.

Sec. 37. Section 2, chapter 163, Laws of 1981 and RCW 74.04.710 are each amended to read as follows:

After service of a notice of debt for an overpayment ((~~as defined in RCW 74.04.300~~)) as provided for in ((~~this chapter~~)) RCW 74.04.700 as recodified by this 1987 act, stating the debt accrued, the secretary may issue

to any person, firm, corporation, association, political subdivision, or department of the state, an order to withhold and deliver property of any kind including, but not restricted to, earnings which are due, owing, or belonging to the debtor, when the secretary has reason to believe that there is in the possession of such person, firm, corporation, association, political subdivision, or department of the state property which is due, owing, or belonging to the debtor. The order to withhold and deliver shall state the amount of the debt, and shall state in summary the terms of this section, RCW 7.33.280, chapters 6.12 and 6.16 RCW, 15 U.S.C. 1673, and other state or federal exemption laws applicable generally to debtors. The order to withhold and deliver shall be served in the manner prescribed for the service of a summons in a civil action or by certified mail, return receipt requested. Any person, firm, corporation, association, political subdivision, or department of the state upon whom service has been made shall answer the order to withhold and deliver within twenty days, exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of therein. The secretary may require further and additional answers to be completed by the person, firm, corporation, association, political subdivision, or department of the state. If any such person, firm, corporation, association, political subdivision, or department of the state possesses any property which may be subject to the claim of the department of social and health services, such property shall be withheld immediately upon receipt of the order to withhold and deliver and shall, after the twenty–day period, upon demand, be delivered forthwith to the secretary. The secretary shall hold the property in trust for application on the indebtedness involved or for return, without interest, in accordance with final determination of liability or nonliability. In the alternative, there may be furnished to the secretary a good and sufficient bond, satisfactory to the secretary, conditioned upon final determination of liability. Where money is due and owing under any contract of employment, express or implied, or is held by any person, firm, corporation, association, political subdivision, or department of the state subject to withdrawal by the debtor, such money shall be delivered by remittance payable to the order of the secretary. Delivery to the secretary, subject to the exemptions under RCW 7.33.280, chapters 6.12 and 6.16 RCW, 15 U.S.C. 1673, and other state or federal law applicable generally to debtors, of the money or other property held or claimed satisfies the requirement of the order to withhold and deliver. Delivery to the secretary serves as full acquittance, and the state warrants and represents that it shall defend and hold harmless for such actions persons delivering money or property to the secretary pursuant to this chapter. The state also warrants and represents that it shall defend and hold harmless for such actions persons withholding money or property pursuant to this chapter.

The secretary shall also, on or before the date of service of the order to withhold and deliver, mail or cause to be mailed by certified mail a copy of

the order to withhold and deliver to the debtor at the debtor's last known post office address, or, in the alternative, a copy of the order to withhold and deliver shall be served on the debtor in the same manner as a summons in a civil action on or before the date of service of the order or within two days thereafter. The copy of the order shall be mailed or served together with a concise explanation of the right to petition for a hearing on any issue related to the collection. This requirement is not jurisdictional, but, if the copy is not mailed or served as provided in this section, or if any irregularity appears with respect to the mailing or service, the superior court, on its discretion on motion of the debtor promptly made and supported by affidavit showing that the debtor has suffered substantial injury due to the failure to mail the copy, may set aside the order to withhold and deliver and award to the debtor an amount equal to the damages resulting from the secretary's failure to serve on or mail to the debtor the copy.

Sec. 38. Section 3, chapter 163, Laws of 1981 and RCW 74.04.720 are each amended to read as follows:

If any person, firm, corporation, association, political subdivision, or department of the state fails to answer an order to withhold and deliver within the time prescribed in RCW 74.04.710 as recodified by this 1987 act or fails or refuses to deliver property pursuant to the order, or after actual notice of filing of a lien as provided for in this chapter, pays over, releases, sells, transfers, or conveys real or personal property subject to such lien to or for the benefit of the debtor or any other person, or fails or refuses to surrender upon demand property distrained under RCW 74.04.710 as recodified by this 1987 act, or fails or refuses to honor an assignment of wages presented by the secretary, such person, firm, corporation, association, political subdivision, or department of the state is liable to the department in an amount equal to one hundred percent of the value of the debt which is the basis of the lien, order to withhold and deliver, distraint, or assignment of wages, together with costs, interest, and reasonable attorney fees.

Sec. 39. Section 74.08.120, chapter 26, Laws of 1959 as last amended by section 15, chapter 6, Laws of 1981 1st ex. sess. and RCW 74.08.120 are each amended to read as follows:

The term "funeral" shall mean the proper preparation, transportation within the local service area defined by the department, and care of the remains of a deceased person with needed facilities and appropriate memorial services. "Burial" includes necessary costs of a lot or cremation and all services related to interment and the customary memorial marking of a grave.

The department is hereby authorized to assume responsibility for payment for the funeral and burial of deceased persons dying without assets sufficient to pay for the minimum standard funeral herein provided: PROVIDED, HOWEVER, That the secretary may furnish funeral assistance for deceased recipients if they leave assets to a surviving spouse and/or to minor children and if the assets are resources permitted to be owned by or

available to an eligible applicant or recipient under RCW 74.04.005, and the department shall thereby have a lien against said assets ((~~valid for six years from the date of filing with the county auditor and such lien claim shall have preference to all other claims except prior secured creditors. If the assets remain exempt, or if no probate is commenced, the lien shall automatically terminate without further action six years after filing~~)) as provided in section 45 of this 1987 act. If the deceased person is survived by a spouse or is a minor child survived by his parent or parents, the department may take into consideration the assets of such surviving spouse, parent, or parents in determining whether or not the department will assume responsibility for the funeral.

The department shall not pay more than cost for a minimum standard service rendered by each vendor. Payments to the funeral director and to the cemetery or crematorium will be made by separate vouchers. The standard of such services and the uniform amounts to be paid shall be determined by the department after giving due consideration to such advice and counsel as it shall obtain from the trade associations of the various vendors and related state departments, agencies, and commissions. Payment made for any funeral or burial service by relatives, friends, or any other third party shall be subtracted from the payment made by the department.

Sec. 40. Section 74.08.338, chapter 26, Laws of 1959 as amended by section 331, chapter 141, Laws of 1979 and RCW 74.08.338 are each amended to read as follows:

When the consideration for a deed executed and delivered by a recipient is not paid, or when the consideration does not approximate the fair cash market value of the property, such deed shall be prima facie fraudulent as to the state and the department may proceed under section 46 of this 1987 act. ((~~The attorney general upon request of the secretary shall file suit to rescind such transaction except as to subsequent bona fide purchasers for value. In the event that it be established by judicial proceedings that a fraudulent conveyance occurred, the value of any public assistance which may have been furnished may be recovered in any proceedings from the recipient or his estate.~~))

Sec. 41. Section 4, chapter 3, Laws of 1981 2nd ex. sess. and RCW 74.09.538 are each amended to read as follows:

(1) Any person who knowingly and wilfully receives cash or resources transferred or assigned for less than fair market value after December 1, 1981, to enable an applicant or recipient to qualify for assistance under RCW 74.09.510 or 74.09.700 is guilty of a gross misdemeanor.

(2) Any person who knowingly and wilfully receives cash or resources transferred or assigned for less than fair market value is liable for a civil penalty ((~~equal to the uncompensated value of the cash or resources transferred or assigned at less than fair market value. The civil penalty shall not exceed the cost of assistance rendered by the department to an applicant or~~

the application of the provision to other persons or circumstances is not affected.

Passed the Senate February 20, 1987.
Passed the House April 7, 1987.
Approved by the Governor April 16, 1987.
Filed in Office of Secretary of State April 16, 1987.

CHAPTER 76

[Senate Bill No. 5327]

PERSONS OF DISABILITY—NOTARIES PUBLIC—ACKNOWLEDGEMENTS FROM PERSONS PHYSICALLY UNABLE TO SIGN NAME—EMPLOYMENT SECURITY DEPARTMENT TO REPORT TO LEGISLATURE ON THE DEPARTMENT'S SPECIAL SERVICES

AN ACT Relating to persons of disability; amending RCW 50.12.210 and 42.44.080; and adding a new section to chapter 64.08 RCW.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 1, chapter 273, Laws of 1977 ex. sess. and RCW 50.12.210 are each amended to read as follows:

It is the policy of the state of Washington that persons with physical, mental, or sensory handicaps shall be given equal opportunities in employment. The legislature recognizes that handicapped persons have faced unfair discrimination in employment.

For these reasons, the state employment service division of the employment security department shall give particular and special attention service to those persons with physical, mental, or sensory handicaps which substantially limit one or more of their major life functions as defined under P.L. 93–112 and rules promulgated thereunder. Particular and special attention service shall include but not be limited to particular and special attention in counseling, referral, notification of job listings in advance of other persons, and other services of the employment service division.

Nothing in this section shall be construed so as to affect the veteran's preference or any other requirement of the United States department of labor.

The employment security department shall report to the house and senate commerce and labor committees by December 1, 1987, on its accomplishments under this section and on its future plans for implementation of this section. The department shall report to the above mentioned committees every odd–numbered year thereafter on its actions under this section.

The employment security department shall establish rules to implement this section.

NEW SECTION. Sec. 2. A new section is added to chapter 64.08 RCW to read as follows:

Any person who is otherwise competent but is physically unable to sign his or her name or make a mark may make an acknowledgment authorized under this chapter by orally directing the notary public or other authorized officer taking the acknowledgment to sign the person's name on his or her behalf. In taking an acknowledgment under this section, the notary public or other authorized officer shall, in addition to stating his or her name and place of residence, state that the signature in the acknowledgment was obtained under the authority of this section.

Sec. 3. Section 8, chapter 156, Laws of 1985 and RCW 42.44.080 are each amended to read as follows:

A notary public is authorized to perform notarial acts in this state. Notarial acts shall be performed in accordance with the following, as applicable:

(1) In taking an acknowledgment, a notary public must determine and certify, either from personal knowledge or from satisfactory evidence, that the person appearing before the notary public and making the acknowledgement is the person whose true signature is on the document.

(2) In taking an acknowledgment authorized by section 2 of this 1987 act from a person physically unable to sign his or her name or make a mark, a notary public shall, in addition to other requirements for taking an acknowledgment, determine and certify from personal knowledge or satisfactory evidence that the person appearing before the notary public is physically unable to sign his or her name or make a mark and is otherwise competent. The notary public shall include in the acknowledgment a statement that the signature in the acknowledgment was obtained under the authority of section 2 of this 1987 act.

(3) In taking a verification upon oath or affirmation, a notary public must determine, either from personal knowledge or from satisfactory evidence, that the person appearing before the notary public and making the verification is the person whose true signature is on the statement verified.

((~~(3)~~)) (4) In witnessing or attesting a signature, a notary public must determine, either from personal knowledge or from satisfactory evidence, that the signature is that of the person appearing before the notary public and named in the document.

((~~(4)~~)) (5) In certifying or attesting a copy of a document or other item, a notary public must determine that the proffered copy is a full, true, and accurate transcription or reproduction of that which was copied.

((~~(5)~~)) (6) In making or noting a protest of a negotiable instrument, a notary public must determine the matters set forth in RCW 62A.3–509.

((~~(6)~~)) (7) In certifying that an event has occurred or an act has been performed, a notary public must determine the occurrence or performance either from personal knowledge or from satisfactory evidence based upon the oath or affirmation of a credible witness personally known to the notary public.

NO. 35399-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KEITH UTTER,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL & HEALTH SERVICES,

Appellant.

ERRATA TO
BRIEF OF APPELLANT

On January 2, 2007, the Appellant, State of Washington, Department of Social and Health Services, filed its Brief of Appellant. Page 26, line 6 contains a typographical error in a citation. The line should read as follows: "*See also* AGO 1976 No. 14 at 3. . . ." The error is also reflected in the Table of Authorities at page viii.

RESPECTFULLY SUBMITTED this 8th day of January, 2007.

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ORIGINAL

CERTIFICATE OF SERVICE

I certify that I served a copy the foregoing Errata to Brief of Appellant on all parties or their counsel of record on the date below as follows:

Name/Address of Party Served:

TODD CARLISLE
NORTHWEST JUSTICE PROJECT
715 TACOMA AVE S
TACOMA WA 98402-2206

☒ US Mail Postage Prepaid via Consolidated Mail Service

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☐ State Campus Delivery

☐ Via facsimile

☐ Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of January, 2007, at Tumwater, Washington.

Laurie Carley

Laurie Carley, Legal Assistant